91-1893

No. _____

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1991

POLARIS INDUSTRIES PARTNERS L.P.,
a limited partnership,
POLARIS INDUSTRIES L.P., a limited partnership,
POLARIS INDUSTRIES ASSOCIATES L.P.,
a limited partnership, and
POLARIS INDUSTRIES CAPITAL CORPORATION,
a Delaware corporation,

Petitioners,

v.

WESTERN POWER SPORTS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the following questions:

I. Whether a court in an antitrust tying case must consider uncontroverted evidence of reasonable substitutes in determining whether a plaintiff's theory of a relevant tying product market should be rejected as a matter of law.

II. Whether a non-moving party, in responding to a motion for summary judgment on an antitrust tying claim, should be required to submit evidence supporting a finding that the tying arrangement resulted in an actual adverse effect on competition or had a substantial potential for impact on competition.

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the petition identifies all parties in the court below. Petitioners (hereinafter collectively "Petitioners" or "Polaris") identify below the known affiliates or other entities with an interest in one or more of the Petitioners listed in the caption:

EIP Associates L.P. - General Partner of Polaris Industries L.P.;

Victor K. Atkins, Jr. - General Partner of Polaris Industries Associates L.P., and General Partner of EIP Associates L.P.;

Hutton EIP L.P. - Limited Partner in EIP Associates L.P.;

EIP Capital Corporation - Managing General Partner of EIP Associates L.P.

Additionally, there are thousands of individual holders of Beneficial Assignment Certificates ("BACs") which evidence an assignment of limited partnership interests in Polaris Industries Partners L.P. At the Court's request, Petitioners would be willing to make those names available to the Court to further enable members of the Court to evaluate possible recusal.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. _____

POLARIS INDUSTRIES PARTNERS L.P., a limited partnership, POLARIS INDUSTRIES L.P., a limited partnership, POLARIS INDUSTRIES ASSOCIATES L.P., a limited partnership, and POLARIS INDUSTRIES CAPITAL CORPORATION, a Delaware corporation,

PETITIONERS,

v.

WESTERN POWER SPORTS, INC., an Idaho corporation,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit, filed December 11, 1991, is unreported pursuant to Ninth Circuit Rule 36-3 and is reprinted in the Petitioners' Appendix ("Pet. App.") at A-1. Only the disposition is contained in a listing at 951 F.2d 365 (9th Cir. 1991) (table). A Petition for Rehearing and a Suggestion for Rehearing En Banc was denied by an Order of the Ninth Circuit dated February 25, 1992. (Pet. App. A-9.) The Federal Court for the District of Idaho's Opinion and Order dated April 3, 1990, granting Petitioners' Motion For Summary Judgment is published at 744 F. Supp. 226 (D. Idaho 1990) and is reprinted at Pet. App. A-12.

JURISDICTIONAL STATEMENT

The Court of Appeals for the Ninth Circuit entered judgment on December 11, 1991. The Ninth Circuit denied a timely petition for rehearing on February 25, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The original jurisdiction of the United States District Court for the District of Idaho was invoked under 28 U.S.C. § 1331 as a civil action arising under the laws of the United States and under 28 U.S.C. § 1332 as a civil action involving citizens of different states.

STATUTES INVOLVED

The statutes involved are Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976) (set out verbatim at Pet. App. A-22), and Section 3 of the Clayton Act, 15 U.S.C. § 14 (1973) (set out verbatim at Pet. App. A-22, 23).

STATEMENT OF THE CASE

A. **The Snowmobile and ATV Markets.** Since 1983, four manufacturers have sold snowmobiles in the United States: The Petitioners, through Polaris Industries L.P., ("Polaris" or "Petitioners" herein), Bombardier, Arctco and Yamaha. Although Arctco left the snowmobile market in the early 1980s, it subsequently reentered. Since its reentry, Arctco has consistently increased its market share.

In 1987 and 1988, Polaris was the only snowmobile manufacturer selling snowmobiles in the lower 48 states through independent distributors, who in turn sold the snowmobiles to retail dealers. The remaining manufacturers sold their snowmobiles directly to retail dealers. Retail sales of snowmobiles are highly influenced by price. Various Polaris distributors testified to the vigorous and intense price competition which always existed in the retail snowmobile market. In 1987 and 1988,

Polaris' share of snowmobiles sold in the United States retail market was approximately 31%.

Until 1985, Polaris sold essentially only snowmobiles and related parts, accessories and clothing. At that time, it joined Honda, Yamaha, Kawasaki and Suzuki as manufacturers who sold ATVs in the United States. In 1985, Respondent Western Power Sports, Inc. ("WPS" or "Respondent") sought to expand its Polaris product line to include ATVs.

B. Respondent's Wholesale Business. WPS has been in the wholesale distribution business since about 1967. Between 1967 and 1988, WPS was a wholesale distributor[1] of numerous products, including Polaris snowmobiles, ATVs and related parts, accessories and clothing; after-market parts from various suppliers for ATVs, snowmobiles and motorcycles; bicycles; mini-motorcycles; camping equipment; string trimmers; boat trailers; chain saws, parts and accessories; numerous golf course accessories; walk-behind mowers; riding mowers; lawn tractors; tillers; edgers; industrial and commercial turf equipment; utility vehicles; and turf vehicles. During the 21 years of its operation, WPS frequently discontinued the wholesaling of certain products and added new products. WPS's president, Mr. James Brandt, testified that the wholesale distribution of snowmobiles, ATVs, lawn mowers, televisions and other products of that nature was very similar. Like WPS, Polaris' other distributors sold wide and diversified product lines, which, in addition to Polaris products, included sound equipment, televisions, furniture, floor covering, boats, motorcycles and generators, snowblowers, lawnmowers, appliances, and heating and air-conditioning equipment.

Within six months after Polaris notified WPS that . . .

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[1] For a three-year period (1985-1988), WPS also sold a wide variety of products as a retailer.

it would not continue as a Polaris distributor, WPS substituted new product lines to distribute at wholesale. It purchased a company called Sierra Motorcycle Products. WPS also entered into another distributor agreement with The Snapper Company (Snapper products include lawn tractors, mowers, tillers and edgers). That agreement allowed WPS to expand its distribution territory of Snapper products.

C. The Polaris-WPS Relationship. The distributor relationship between Polaris and WPS was conducted pursuant to a series of written one-year agreements. Pursuant to those agreements, the distributorship rights expired on March 31 of each year unless Polaris and WPS agreed in writing to a renewal for another one-year period.

In early 1987, Polaris informed WPS that at the end of that contract year -- March 31, 1987 -- it would not renew WPS's ATV and snowmobile distributor agreements for various performance reasons. WPS requested that it be allowed to continue as a distributor of Polaris ATVs and snowmobiles, and, as a condition of the renewal, WPS specifically agreed to certain performance goals, including a purchase goal of 1,310 1988 model Polaris ATVs.

In the 1986-87 season, WPS had sold approximately 825 1987 model Polaris ATVs. In the summer of 1987, Polaris became aware that the ATV industry was experiencing a sales decline. In September 1987, Polaris contacted WPS and asked it to sign an order for 825 1988 Polaris ATVs. Mr. Brandt signed the order on behalf of WPS. Mr. Brandt admits he understood, when he signed the order in the fall of 1987, that if Polaris shipped 825 1988 model ATVs, he was obligated to accept them.

During the subsequent months of November and December 1987 and January 1988, WPS began to realize that dealers were not ordering as many 1988 ATVs as WPS had projected. In March 1988, WPS informed Polaris that

it would not accept delivery of the 825 Polaris ATVs to be delivered pursuant to its order. WPS already had received 295 1988 model ATVs. At that time, Polaris had not yet decided whether it would renew its distributor relationship with WPS for 1988-89. On March 18, 1988, during discussions about WPS's decision not to accept delivery, WPS informed Polaris that it wanted the conditions for a renewal enumerated in writing. Later that day, Polaris sent WPS a letter which stated:

> As a follow up to our telephone conversation today, please be advised that if you take delivery of the 828 unit ATV order, as available from Polaris under cash payment terms, and fulfill the other requirements of the Distributor Agreement including, but not limited to, the 1988/89 snowmobile order, your Snowmobile and ATV Distributor Agreements will be renewed effective 4/1/88.

When WPS refused to provide the requested written acknowledgement to Polaris' letter, Polaris notified WPS that it would not renew the distributor agreements. Polaris did not appoint another distributor. Instead, Polaris subsequently distributed its products directly to retail dealers.

D. Course of Proceedings and Disposition Below.

1. WPS commenced an action in the Federal District Court for the District of Idaho in May 1988, two months after Polaris elected not to renew the parties' one-year distributor agreements for Polaris snowmobiles and ATVs. In its complaint, WPS averred that Polaris illegally tied the

purchase of certain ATVs to the wholesaling of snowmobiles. (Pet. App. A-13, 14.) WPS contended that Polaris' conduct violated Section One of the Sherman Act (First Claim), Section Three of the Clayton Act (Second Claim), Idaho Code § 48-101 (unreasonable restraint of trade) (Third Claim) and Idaho Code § 48-104 (unfair competition) (Fourth Claim). WPS also asserted a common-law claim for "bad-faith" termination (Fifth Claim).[2]

Over a 20-month period, the parties conducted extensive discovery on WPS's claims including voluminous written discovery and 24 depositions. After the completion of discovery, Polaris filed a motion for summary judgment on WPS's First through Fifth Claims. On April 3, 1990, Judge Callister issued a written decision and Order granting Polaris' motion for summary judgment in all respects. (Pet. App. A-12.) The Court entered an Amended Order on April 10, 1990, reaffirming its previous Order and specifying that the entry of judgment was for partial summary judgment, which the District Court certified as final and appealable pursuant to Fed. R. Civ. P. 54(b). (Pet. App. A-20.)

The District Court based its decision to grant Polaris' summary judgment motion on several grounds. First, the District Court rejected WPS's contention, based solely on the proffered opinion of WPS's expert, that the relevant tying product market was limited to the wholesaling of snowmobiles. (Pet. App. A-15-16 n. 2.) The District Court found that the relevant tying product market was the retail snowmobile market. (Pet. App. A-15.) Recognizing that Polaris' 31% retail market share was almost identical to the market share found to be insufficient in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984), the District Court held that, as a matter of law,

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[2] In a Supplemental Complaint, WPS asserted an additional claim for an amount allegedly due and owing on its open account with Polaris (Sixth Claim). That claim is still pending and not an issue on appeal.

Polaris lacked market power in the retail market. Id.

Second, the District Court found that on balance WPS had failed to present evidence supporting any unreasonable restriction of competition which would outweigh the pro-competitive effects from Polaris' alleged tying arrangement. (Pet. App. A-17.) An additional basis for summary judgment on WPS's Clayton Act claim was the District Court's conclusion that the "wholesaling" of snowmobiles did not constitute "goods, wares, merchandise, machinery or commodities" as required under Section 3 of the Clayton Act. (Pet. App. A-17, 18.)

2. The Ninth Circuit reversed and remanded for trial. While the District Court rejected WPS's contention that the relevant market was the wholesaling of snowmobiles, the Ninth Circuit concluded that WPS's proffered expert opinion proposing such a relevant market created a factual dispute. Since the definition of the relevant tying product market was disputed, further analysis, at a summary judgment stage, of WPS's antitrust claims was precluded.[3]

The Ninth Circuit nevertheless considered Polaris' statement that the record contained no evidence of any foreclosure of commerce or anti-competitive effect on competition in the tied product market. While the Ninth Circuit identified a perceived inconsistency between portions of this Court's Jefferson Parish decision addressing the necessary effect on commerce in the tied product market, it did not attempt to resolve it. Rather, it concluded (without citation to any evidence) that Polaris could "effectively [preclude] its distributors from entering the wholesale market for ATVs and the market for ATV distributorships." (Pet. App. A-5, A-6.)

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[3] The Ninth Circuit's reasoning with respect to the relevant market definition served as a basis for reversing both the per se and "rule of reason" claims under Section One of the Sherman Act. (Pet. App. A-3, A-6 n.3.)

Finding fact issues as to the relevant market definition and the effect on competition, the Ninth Circuit also reversed summary judgment on WPS's "rule of reason" claim and its Idaho state law antitrust claim. Finally, the Ninth Circuit stated that the Clayton Act does apply to WPS's claim because, although the alleged tying product was the wholesaling of snowmobiles, WPS purchased "goods" (snowmobiles and ATVs) within the meaning of the Clayton Act from Polaris for resale. (Pet. App. A-6, A-7.) As with WPS's claim under the Sherman Act, the Ninth Circuit stated that the genuine issue of material fact regarding the relevant tying product market also prevented summary judgment on the Clayton Act claim. (Pet. App. A-8.)[4] On February 25, 1992, the Ninth Circuit Panel denied Polaris' timely Petition for Rehearing. (Pet. App. A-9.)

ARGUMENT IN SUPPORT OF GRANTING THE PETITION

The basis for WPS's claim against Polaris is its contention that Polaris engaged in an illegal tying arrangement by tying the wholesaling of snowmobiles to the purchase of "unwanted" ATVs which WPS had previously ordered. In reversing the District Court's grant of summary judgment, the Ninth Circuit failed to adopt a "reasonable interchangeability" standard in its review of WPS's proposed relevant tying product market. Instead, it merely accepted a conclusory "expert" statement regarding

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[4] Respondent WPS sought relief under the Sherman Act, and the Clayton Act, and under Idaho's state antitrust statute and related claims under Idaho state law. The District Court's summary judgment order, as revised, disposed of each of these claims based on its finding that the federal antitrust laws had not been violated as a matter of law. After the Ninth Circuit found a genuine issue of material fact on the federal antitrust claims, it did not separately analyze any of the Idaho state law claims, and they are therefore not before this Court.

the relevant tying product market definition. Additionally, on the basis of a perceived ambiguity in Jefferson Parish, the Ninth Circuit speculated about potential effects on competition rather than requiring the non-moving party to submit facts which demonstrated that the alleged tying arrangement had an impact on competition or any anti-competitive effect.

Tying claims under the Sherman Act and the Clayton Act are analyzed both for per se liability and, alternatively, under the rule of reason, for their pro-competitive and anti-competitive effects. To establish a per se tying claim, a plaintiff must present facts showing:

1. An arrangement wherein the seller forces a tie-in between two distinct products or services;

2. Sufficient market power in the tying product market to impose significant restrictions in the tied product market; and

3. An adverse effect on a not insubstantial volume of commerce in the tied product market.

See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12-18; Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6 (1958). For a tying claim under the "rule of reason," the legality of the challenged conduct "depends on its competitive consequences, not on whether it can be labeled 'tying'" and requires an inquiry into the actual effect of the challenged arrangement on interbrand competition. Jefferson Parish, 466 U.S. at 21 n.34. "Rule of reason" analysis requires a court to review an alleged restraint of trade and determine whether, on balance, the practice promotes or suppresses competition in the relevant

market. National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984).[5]

This Court has determined that summary judgment is a legitimate procedure for weeding out cases where a plaintiff cannot establish a factual basis for the material allegations of its complaint. See Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). In Celotex, the Court stated Rule 56 mandates that after adequate time for discovery, as has been afforded WPS in this action, summary judgement is appropriately granted against a party who fails to establish facts supporting each essential element of its claim. Celotex, 466 U.S. at 322-23.

In Matsushita, this Court held that an antitrust plaintiff (such as WPS) opposing summary judgment carries the burden of setting forth specific facts which "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. The Court affirmed summary judgment for the defendants, stating that where the factual context of an antitrust claim "renders [the] claim implausible -- if the claim is one that simply makes no economic sense -- [a plaintiff] must come forward with more persuasive evidence than would otherwise be necessary" to successfully oppose summary

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[5] WPS alleges violation of both Section 1 of the Sherman Act and Section 3 of the Clayton Act on the same underlying facts. Despite certain differences in legislative history and policy underlying the two statutes, per se antitrust tying liability depends upon the same analysis. See Jefferson Parish, 466 U.S. at 23 n.39 (citing Times-Picayune Publishing Co. v.United States, 345 U.S. 594, 608-09 (1953)); see also Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977) (referring to Fortner Enters. Inc. v. U.S. Steel Corp., 394 U S. 495 (1969)). Accordingly, except for the contention that the Clayton Act does not apply to an intangible service defined as the "wholesaling of snowmobiles" (the alleged tying product), the lower courts applied the same per se standards to WPS's First and Third Claims.

judgment. Matsushita, 475 U.S. at 587 n. 14.[6]

In this case, the Ninth Circuit improperly relieved WPS of its burden to "set forth specific facts showing that there is a genuine issue for trial." See Liberty Lobby, 477 U.S. 242, 256 (1986). The Ninth Circuit held that the parties' purported factual dispute (only created by the submission of "expert" testimony) concerning the scope of the relevant tying product market precluded summary judgment.[7] However, WPS presented an economically implausible theory of the relevant tying market product and failed to submit the "more persuasive evidence" in support of that theory. The record contains no evidence to support a tying product market limited only to the wholesaling of snowmobiles; WPS admitted that the wholesaling of other products such as lawnmowers and televisions was very similar. The Ninth Circuit should have considered such evidence to determine whether the availability of reasonable substitutes, as a matter of law, affected the scope of the market.

Additionally, the Ninth Circuit improperly hypothesized about effects on competition, rather than relying on the record. The record contains no evidence of any substantial potential for impact on competition or any

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[6] The plaintiffs' evidence in Matsushita, like WPS's evidence, consisted merely of an expert's opinion. This Court stated that such an expert's opinion had little probative value compared with actual economic factors. There, the Court found the suggestion that the alleged Japanese conspirators had depressed prices and sold goods at substantial losses was irrational. Matsushita, 475 U.S. at 594 n. 19. See also Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, n. 16 (3d Cir. 1992) (citing Fed. R. Civ. P. 56(e) and Lujan v. National Wildlife Federation, ___ U.S. ___, 110 S. Ct. 3177, 3188 (1990)).

[7] By premising each of its rulings on the perceived existence of a factual dispute on the relevant market inquiry, the Ninth Circuit's approach has eviscerated the potential for eliminating meritless, unsupported antitrust tying claims at summary judgment. See Celotex, 427 U.S. at 327.

adverse effect on competition resulting from the alleged tying arrangement. Polaris and WPS simply had a contract dispute regarding a purchase order for ATVs--an order to which WPS initially agreed, but later repudiated after market conditions changed. In situations where a purchaser claims it was forced to buy "unwanted" product without any evidence that it would have bought the "unwanted" product from another seller in the tied product market, a court should be required to reject the tying claim since there can be no adverse impact on competition. See Jefferson Parish, 466 U.S. at 16. The uncontroverted facts demonstrate WPS's complaint arises not from any violation of the antitrust laws, but from a business dispute between a single manufacturer and a distributor of its products.[8] Polaris refused WPS's request to renegotiate an ATV order and, for a number of reasons, decided to discontinue doing business with WPS and instead sell its products directly to retailers.

The Court should grant review and take the opportunity to further define both the evidentiary requirements for antitrust litigants in the federal courts and the permissible economic and legal parameters in which antitrust tying claims can be maintained. The Ninth Circuit's analysis in this case improperly distorts relevant market definition analysis in antitrust tying cases. The Ninth Circuit's departure from binding antitrust precedent in this Court also presents a conflict with other federal circuits and invites unnecessary, expensive antitrust litigation by disappointed businesses on economically implausible theories. See Data General Corp. v. Digidyne Corp., cert. denied, 473 U.S. 908, 909 (1985) (White, J., dissenting) (noting potentially enormous effect of failure to address tying issues raised by Ninth Circuit).

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[8] The specific act of which WPS complains is Polaris' decision not to renew a one-year snowmobile distributor agreement.

I. ON A MOTION FOR SUMMARY JUDGMENT, COURTS MUST CONSIDER UNCONTROVERTED EVIDENCE OF REASONABLE SUBSTITUTES IN CONSIDERING A PLAINTIFF'S RELEVANT MARKET THEORY.

The Ninth Circuit's finding of a factual dispute regarding the relevant tying product market ignores WPS's admissions regarding "reasonable interchangeability" -- that it viewed wholesaling for products such as snowmobiles, ATVs, lawnmowers and televisions as very similar. In the context of WPS's multi-line wholesale business, such alternatives should be critical to the definition of a relevant tying product market. In defining the scope of a relevant market in a merger and acquisition case, this Court previously stated the "reasonable interchangeability of use" for a product must be examined. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). Moreover, the scope of the relevant tying product market should depend on "how far buyers will go to substitute one commodity for another." United States v. Du Pont & Co., 351 U.S. 377, 393 (1956) (in an attempted monopolization case, a single manufacturer's production of cellophane could not constitute the relevant market).

In the context of a relevant product market definition in an antitrust tying case, this Court has held that "any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact." Jefferson Parish, 466 U.S. at 18.[9]

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[9] For that reason, the Court's per se tying analysis in Jefferson Parish focused on a tying product market defined as the hospital's sale of anesthesiological services to its patients, rather than its contractual arrangements with providers of anesthesiological services. Id. As with the per se analysis, any inquiry into an alleged illegal tying claim under the rule of reason also must be premised on an acceptable definition of the relevant market. Jefferson Parish, 446 U.S. at 29-30. As the

Like the scope of a relevant market in other antitrust cases, the scope of a relevant market in a tying case also should include reasonable substitutes. Here, the Ninth Circuit however ignored WPS's admission regarding substitutes. Instead, it relied solely on an expert's unsubstantiated statement that the relevant tying product market was the market for the "wholesaling of snowmobiles," without any inquiry into the cross-elasticity of demand, i.e., the existence of reasonable substitutes.[10]

Other circuits, however, have considered reasonable substitutes in their review of plaintiffs' proposed relevant tying product markets. Most recently, the Third Circuit affirmed summary judgment for an automobile manufacturer where audio suppliers alleged illegal tying of the manufacturer's sale of cars to the purchase of the manufacturer's audio systems. Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 1992-1 Trade Cases ¶ 69,773 (3d Cir. March 26, 1992). In Town Sound, the Third Circuit affirmed the district court's

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uncontroverted record and the discussion infra demonstrate, WPS's unduly restrictive proposed tying product market should have been rejected as a matter of law.

[10] Focusing on the products - snowmobiles - the District Court in this case concluded that the retail snowmobile market was the appropriate relevant market. (Pet. App. A-15.) The record contained uncontroverted evidence of the intense price competition in the retail snowmobile market among the four manufacturers' models. Polaris cannot and did not tie any sales on the retail level. There is no evidence in the record that consumers had to buy a Polaris ATV to obtain a Polaris snowmobile. All snowmobile manufacturers distribute their products through intermediate wholesale channels -- distributors and/or dealers. None sell to consumers directly. Accordingly, each manufacturer's retail market share also reflects its percentage of wholesale sales. In the retail market, Polaris had only a 31% market share. By implication, the share of Polaris snowmobiles "wholesaled" could be only 31%. Compare Jefferson Parish, 466 U.S. at 26 (30% market share insufficient to confer market power.)

rejection of a proposed tying product market limited to new Chrysler cars. Id. The Third Circuit considered the defendant's unrebutted evidence of interchangeability among new cars, i.e., Chrysler cars compete against many other companies' automobiles. Id.[11]

Similarly, the Sixth Circuit recently reversed a jury verdict, vacated an injunction and entered judgment n.o.v. for a computer system manufacturer against which computer service organizations had filed a tying claim. Virtual Maintenance, Inc. v. Prime Computer, Inc., 957 F.2d 1318 (6th Cir. February 27, 1992) (reh. denied, April 13, 1992). In Virtual Maintenance, the district court had denied summary judgment for the manufacturer, finding a disputed fact issue regarding the relevant tying product market definition. Virtual Maintenance, 735 F. Supp. 231, 235 (E.D. Mich. 1990). On appeal after a multi-million dollar jury verdict in favor of the plaintiffs on the tying claims, the Sixth Circuit reversed, vacated and remanded with instructions that judgment be entered in favor of the manufacturer. Virtual Maintenance, 957 F.2d at 1330.

Based on the Brown Shoe "reasonable interchangeability" standard, the Sixth Circuit stated:

> The essential test for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendant's product or service . . . (citations omitted) . . . Cross-elasticity of supply also helps

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[11] To support its purported tying product market definition, plaintiffs in Town Sound offered a conclusory affidavit from their expert, who merely agreed with plaintiffs' allegations. The Sixth Circuit rejected this conclusory affidavit in affirming summary judgment for Chrysler. Town Sound, 959 F.2d 468, n. 16.

> define a relevant product market. Cross-elasticity of supply is the degree to which producers will enter the market to compete if prices rise (citations omitted).

Virtual Maintenance, 957 F.2d at 1325. The Sixth Circuit concluded that the appropriate tying product market definition was "the sale of software revisions and support for the CAD/CAM industry in general." It rejected the plaintiffs' proposed product market definition limited to the sale of products "necessary to do business with Ford Motor Company," on the grounds that a single customer's preference for a certain manufacturer's brand does not create a separate product market. Virtual Maintenance, 957 F.2d at 1326-27 (citations omitted).[12]

Additionally, the definition of a relevant market should take into consideration the supply side aspects of a proposed market. As the Sixth Circuit has stated, "[T]he relevant product market cannot be determined without considering the cross-elasticity of supply." Virtual Maintenance, 957 F.2d at 1327. See Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 798 (1st Cir. 1988) (cross-elasticity of supply shown in a market where numerous competitors could and did offer similar dealerships); M. Leff Radio Parts, Inc. v. Mattel, Inc., 706

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[12] Numerous circuits have rejected plaintiffs' proposed relevant market definitions limited to a single manufacturer's products. See Kenworth of Boston, Inc. v. Paccar Financial Corp., 735 F.2d 622, 623-24 (1st Cir. 1984); Kingsport Motors, Inc. v. Chrysler Motors Corp., 644 F.2d 566, 571 (6th Cir. 1981); H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1538 (8th Cir. 1989) (reh. denied, 876 F.2d 59); Stearns v. Genrad, Inc., 752 F.2d 942, 946-47 (4th Cir. 1984); Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 282-83 (5th Cir. 1978), cert. denied, 440 U.S. 938 (1979); Tunis Bros. Co., Inc. v. Ford Motor Co., 952 F.2d 715, 724-27 (3d Cir. 1991) (rejecting relevant market definition limited to Ford trucks). But see Parts & Electric Motors, Inc. v. Sterling Electric, Inc., 826 F.2d 712, 720 (7th Cir. 1987) (allowing single manufacturer market for admittedly unique electric motor parts).

F. Supp. 387, 399 (W.D. Pa. 1988) (court rejected distributor's attempt to define relevant market by including manufacturer with whom it had contract but excluding competing manufacturer who had previously turned down plaintiff's request for distributorship; argument ignored reasonable interchangeability standard under Brown Shoe).

A review of the "reasonable interchangeability" on the supply side requires an analysis of any barriers to entry in the proposed market. If a competitor may offer a similar product or service, no barrier to entry should be found. See Virtual Maintenance, 957 F.2d at 1327. A competitor must be unable to offer a similar package; a choice not to do so cannot constitute a barrier. See Spartan Grain & Mill Co. v. Ayers, 735 F.2d 1284, 1287 (11th Cir. 1984), cert. denied, 469 U.S. 1109 (1985).

In the instant case, the Ninth Circuit failed to consider the uncontroverted evidence regarding the reasonable interchangeability on either the demand (product) or the supply (manufacturer) sides. On the demand side, the market in which the alleged tie occurred was the wholesale market. Multi-line distributors, such as WPS, wholesale numerous products. WPS's specific admissions that the wholesaling of snowmobiles, ATVs, lawnmowers, televisions "and other products of this nature . . . is very similar" required a finding, as a matter of law, that the relevant tying product market could not be limited to the "wholesaling of snowmobiles." WPS's president testified that:

> A. Distribution of snowmobiles and ATVs and lawnmowers and other products of this nature in my opinion is very similar. The way to be successful at it is to stay close to dealers, to talk to them, to treat them fairly, to give them a fair profit, as best you can treat them right and give them good

service. We had been doing that for many years in snowmobiles and we said we could do it in ATVs.

Q. Would you have felt the same with respect to the distribution of television sets?

A. Yes.

WPS's business practices confirmed the interchangeability of various products in its wholesale business. Over its twenty years of operation, WPS discontinued the wholesaling of certain products and added new products to its wholesaling business. WPS was a wholesale distributor for a wide range of products including chain saws, mini-motorcycles, camping equipment, golf course accessories, power turf vehicles and turf equipment, lawn mowing and garden equipment, and Polaris snowmobiles and ATVs.[13] After Polaris elected not to continue using WPS as its distributor, WPS acquired the assets of a motorcycle company and expanded its distribution territory of Snapper lawn and garden products.

On the supply side, WPS submitted no evidence that any other snowmobile manufacturer was precluded from using WPS, or any other company, as a wholesaler of their snowmobiles. Rather, each of the other snowmobile manufacturers merely chose not to do so.[14] If Polaris'

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[13] WPS submitted no evidence that Polaris had any power in a market defined to include the wholesaling of various products including snowmobiles, ATVs, lawnmowers, camping equipment, garden equipment, chain saws, televisions, etc.

[14] WPS's tying product market definition is further exposed as economically implausible since under WPS's interpretation of that market--"the wholesaling of snowmobiles"--of which Polaris allegedly had a 100% market share, the "market" ceased to exist after Polaris sold its

decision to use wholesalers conferred "market power" upon it to such an extent that it could force the wholesalers to take "unwanted" ATVs or other "unwanted" products, other snowmobile manufacturers would have changed their distribution channels and also sold their snowmobiles through wholesalers. Additionally, WPS submitted no evidence that any other manufacturer of products of the "nature" of snowmobiles, ATVs, lawnmowers or televisions, could not offer WPS the opportunity to wholesale such a manufacturer's products. Therefore, since the Ninth Circuit should have been required to consider the uncontroverted high cross-elasticity of supply, WPS's proposed market definition of "wholesaling of snowmobiles" should have been rejected as a matter of law. Instead, the Ninth Circuit erroneously accepted WPS's unsupported expert's statement (Pet. App. A-6, n. 3.), without consideration of these necessary factors.

Like the District Court in this case, various federal courts have rejected unsupported economic expert testimony under Fed. R. Evid. 403 and 703 where the theory advanced is implausible and other evidence of record undermines the probative value of the expert's opinion. See Matsushita, 505 F. Supp. 1313, 1356-63 (E.D. Pa. 1980), affirmed, 475 U.S. 578, 594. See also Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 663 F. Supp. 1360, 1478-81 (D. Kan. 1987), affirmed, 899 F.2d 951 (10th Cir.), cert. denied, ___ U.S. ___, 110 S. Ct. 3241 (1990); American Bearing Company, Inc. v. Litton Industries, 540 F. Supp. 1163, 1169-75 (E.D. Pa. 1982), affirmed, 729 F.2d 943 (3d Cir. 1984), cert. denied, 469 U.S. 854 (1984); Baxley-Delamar Monuments v. American Cemetery Ass'n., 938 F.2d 846,

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snowmobiles and ATVs directly to retail dealers. In considering alternative means of distributing its products to consumers, Polaris should not be put at risk of being characterized as an illegal monopolist merely by virtue of its unilateral decision to deal indirectly with retailers through a distributor.

850-51 (8th Cir. 1991) (an expert opinion based on assumption and not on market analysis cannot create a triable issue of fact for the jury). Under Matsushita, WPS had the burden to come forth with specific facts supporting its expert's definition of a very limited tying product market. WPS failed to meet that burden. The Ninth Circuit should have considered WPS's admission regarding the reasonable interchangeability of numerous products in its wholesale business. The Ninth Circuit also should have considered the absence of any barriers to entry into the "wholesaling of snowmobiles." Such a review would have demonstrated that WPS's proposed tying product market made no economic sense.

The most recent federal circuit court decisions, including the present case, Virtual Maintenance, and Town Sound, evidence that guidance is needed to ensure that "reasonable interchangeability" is applied in the context of tying product market definitions. This case presents the opportunity for the Court to establish concise standards for the analysis of proposed tying product markets and the use of summary judgment procedures where market theories are unsubstantiated or inconsistent with economic realities.

II. POLARIS' PURPORTED TYING ARRANGEMENT CREATED NO ANTI-COMPETITIVE EFFECT AND HAD NO SUBSTANTIAL POTENTIAL FOR IMPACT ON COMPETITION IN THE ATV MARKET.

In addition to its acceptance of an unsubstantiated "expert" opinion to find a fact issue on the relevant market definition, the Ninth Circuit speculated about the possible, but unproven, anti-competitive effect or foreclosure of

competition resulting from the alleged tying arrangement.[15] As this Court has stated:

> [N]ot every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts (footnote omitted).

Jefferson Parish, 466 U.S. at 11-12.

"Without a showing of actual adverse effect on competition, [a plaintiff] cannot make out a case under the antitrust laws . . .." Jefferson Parish, 466 U.S. at 31 (discussing rule of reason claim). See also National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 n.26 (1984) (since a tying arrangement may have pro-competitive justifications, considerable market analysis should be undertaken to review the actual effects of the arrangement). This requirement is nearly indistinguishable from the third element of a per se claim identified earlier in Jefferson Parish. The Court stated:

> [W]hen a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no

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[15] "[B]y forcing its snowmobile distributors to distribute its ATVs, Polaris effectively precluded its distributors from entering the wholesale market for ATVs and the market for ATV distributorships. Though the tying arrangement may also have had pro-competitive effects, we cannot say as a matter of law that these effects outweigh the arrangement's anti-competitive effects." (Pet. App. A-5, A-6.)

> adverse impact on competition because no portion of the market which would otherwise have been available to seller has been foreclosed.

Jefferson Parish, 466 U.S. at 16 (emphasis added). The Court's discussion regarding "no adverse impact" obviously applies to the third element--that the plaintiff submit evidence that the tying arrangement foreclose a not insubstantial volume of commerce.[16]

A plaintiff seeking to establish liability under either the per se test or the "rule of reason" therefore should be required to present evidence that the alleged tying arrangement had some adverse impact on competition in the tied product market.[17] See Cemar, Inc. v. Nissan Motor Corp. U.S.A., 678 F.Supp. 1091 (D. Del. 1988). In Cemar, a federal court dismissed a per se tying claim because the plaintiff dealer could not prove the anti-competitive consequences which that court found were required under Jefferson Parish. Cemar, 678 F. Supp. at 1099. There, the dealer complained it was required to purchaser "unpopular" car models from the defendant manufacturer as a prerequisite for obtaining "popular" vehicles. The dealer admitted it did not want the unpopular models and did not contend that it would have purchased the unpopular vehicles elsewhere. Since no other seller competed with the defendant to sell unpopular

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[16] Rather than analyzing a perceived inconsistency in the Jefferson Parish decision on the plaintiff's burden to establish actual adverse impact on competition, the Ninth Circuit impermissibly speculated about WPS's possible desires to wholesale other manufacturers' ATVs. (Pet. App. A - 4,5.)

[17] As Justice O'Connor has noted, "The 'per se' doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement (footnote omitted)." Jefferson Parish, 466 U.S. at 34 (O'Connor, J., concurring).

vehicles to the plaintiff dealer, the Cemar court concluded that "the alleged tying agreement could not foreclose competition in the market for unpopular vehicles." Id.

In this case, the record contains no evidence that Polaris prevented WPS or any other distributor from carrying other brands of ATVs or that it forced its snowmobile distributors to carry ATVs. Rather, the uncontroverted facts demonstrate that one of the distributors wholesaled both Kawasaki and Polaris ATVs and that WPS wanted to distribute Polaris ATVs.

This case does not involve antitrust competition issues. It involves a contractual dispute between a manufacturer and its distributor with respect to the quantity of product to be purchased and accepted. In the fall of 1987, WPS signed a purchase order for 825 1988 model ATVs, but admittedly changed its mind about the size of its order after the ATV market conditions subsequently changed.[18] It refused to accept delivery of all 825 ATVs. Like the plaintiff in Cemar, WPS has not alleged or submitted any evidence that it would have purchased the "unwanted" ATVs from another seller. If WPS refused to accept its entire order of Polaris ATVs due to the general conditions in the ATV market, WPS would not have been willing to purchase more ATVs from some other source.[19]

A court also should be required and permitted, on a motion for summary judgment, to balance the pro-competitive and anti-competitive effects in analyzing a rule of reason claim. See Smith Machinery Co., Inc. v. Heston Corp., 878 F.2d 1290, 1296 (10th Cir. 1989) (dismissing

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[18] Polaris' proposed order of 825 1988 ATVs was substantially lower than the original purchase goal, to which WPS admittedly agreed, of 1310 1988 ATVs.

[19] WPS's allegation regarding the quality of Polaris ATVs is irrelevant since no claim was made that Polaris tied products at the retail level.

tying claims after balancing the pro-competitive and anti-competitive effects). As the Tenth Circuit stated, "Common sense informs us that in most cases when, as here, the manufacturer does not prohibit a dealer from carrying competing lines, [a requirement that a dealer carry its full line of products] enhances interbrand competition by making another [product] available to the public." Id.

Here, Polaris submitted evidence which demonstrated the legitimate, pro-competitive effects of the purported tying arrangement. The introduction of Polaris ATV products expanded consumers' choices of available alternatives in the ATV market, and allowed Polaris products to compete with other brands of ATVs.

WPS mistakenly confuses its own disappointment over Polaris' decision not to renew its distributorship with its burden to prove an adverse effect on competition. The goal of antitrust laws is to protect competition, not individual competitors. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S.477 (1977). Where only a single purchaser, such as WPS, allegedly was forced to purchase a tied item, a finding of any substantial potential for impact on competition should be precluded as a matter of law.

Summary judgment is intended to weed out cases for which plaintiffs cannot present triable issues of fact. As evidenced by this case, guidance is needed on the standards which federal courts should apply in tying cases for the plaintiff's burden to provide evidence of anti-competitive effects or substantial potential for impact on competition in opposing summary judgment motions. Summary judgment standards also should not be disregarded or abandoned in antitrust tying cases merely because the plaintiff proffers "expert" testimony, especially when that testimony rests on unsupported conclusions and contradicts independent undisputed facts undermining the plaintiff's claims.

CONCLUSION

For all the foregoing reasons, the Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Western Power Sports, Inc., **No. 90-35359**

Plaintiff-Appellant,

FILED
FEB 25 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

v. **D.C. No. CV-88-1191-MJC**

Polaris Industries Partners L.P.;
Polaris Industries L.P.;
Polaris Industries Associates L.P.;
Polaris Industries Capital
Corporation, **MEMORANDUM***

Defendants-Appellees.

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted January 11, 1991
Portland, Oregon

Before: BROWNING, CANBY and TROTT, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Polaris Industries (Polaris) is a manufacturer of snowmobiles, all-terrain-vehicles (ATVs) and other products. Polaris is the only manufacturer that sells snowmobiles to wholesale distributors; other snowmobile manufacturers sell directly to retailers. Western is a wholesale distributor of snowmobiles and other products. Beginning in the late 1980's, Polaris allegedly required its snowmobile distributors, including Western, to purchase specified quantities of ATVs and terminated the snowmobile distributorship agreements of distributors who failed to purchase their allotment of ATVs.

When the market for ATVs experienced a serious downturn, Western objected to this arrangement. Eventually, Western refused to purchase the allotted number of Polaris ATVs and Polaris terminated its snowmobile distributorship. This suit followed. Western alleges Polaris had imposed an illegal "tying arrangement" in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, section 3 of the Clayton Act, 15 U.S.C. § 14, and Idaho antitrust law. Western also asserts other state law claims. The district court granted summary judgment for Polaris on all claims. We reverse.

To establish a tying arrangement that is illegal per se, the plaintiff must show (1) the tying of two products; (2) defendant had sufficient economic power in the tying product market to affect the tied product market, and (3) an effect on a substantial volume of commerce in the tied product market. Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1411 (9th Cir. 1991).

A tying arrangement exists when a seller refuses to sell one product (the tying product) unless the purchaser agrees to purchase another product (the tied product). Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958); Bhan, 929 F.2d at 1411. The district court concluded there was a genuine issue of material fact as to whether a tying arrangement existed. Viewing the evidence in the light most favorable to Western, see Tzung v. State Farm Fire

And Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989), we reach the same conclusion. Western offered evidence sufficient to permit a trier of fact to decide Polaris had tied sales of the two products -- that is, had required distributors to purchase ATVs in order to obtain snowmobiles -- including a statement by Polaris' director of product development admitting the existence of a tying arrangement.[1]

To determine whether Polaris possessed sufficient power in the snowmobile market to affect commerce in the ATV market, the snowmobile market must first be defined. "Defining the relevant market is a factual inquiry . . . ." Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1446 (9th Cir. 1988). Thus, the relevant market may be determined on summary judgment only if there is no genuine issue of material fact on this question. See Bhan, 929 F.2d at 1413 & n.9.

Polaris offered evidence the relevant market was either the retail market for snowmobiles or the market for wholesale distributorships generally. However, Western offered evidence, including the testimony of Professor Whitelaw, sufficient to permit a trier of fact to find the tying product market was the wholesale market for snowmobiles.

Since the relevant market for the tying product was disputed, the district court could not conclude Polaris' power in that market was not sufficient to allow Polaris to affect a substantial volume of commerce in the tied product. If Western's evidence is credited, Polaris had 100% of the tying product market, presumptively sufficient to give Polaris the market power required to establish a per se

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[1]Polaris' contention that the distributorship termination merely reflected Polaris' refusal to acquiesce in Western's attempt to evade its voluntary contractual obligation to purchase the ATVs simply raises a question for the jury. This factual dispute illustrates why the grant of summary judgment was improper.

violation. See Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984) (defendant's monopoly of the tying market gives defendant sufficient market power to allow plaintiff to establish a per se violation).[2]

Polaris argues summary judgment was nevertheless appropriate because Western would not have purchased ATVs from any manufacturer if not compelled to purchase them from Polaris. Polaris relies on the following statement in Jefferson Parish:

> [W]hen a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

466 U.S. at 16.

If interpreted as Polaris interprets it, this passage would appear to be at odds with another earlier in the Jefferson Parish opinion in which the Court said competition was restrained and the Sherman Act violated when the seller exploited its power over the tying product to force the buyer to purchase a tied product the buyer "either did not want at all, or might have preferred to purchase elsewhere . . . ." 466 U.S. at 12 (emphasis added). But see Wells Real Estate, Inc. v. Greater Lowell Board of Realtors, 850 F.2d 803, 814-15 (1st Cir. 1988) (reconciling the two passages by interpreting the "no adverse impact" passage as applying to plaintiff's showing as to the "not insubstantial" volume of commerce foreclosed by the tie).

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[2]Neither Polaris nor Western challenges the district court's determination that the tying arrangement affected a substantial volume of commerce in ATVs, the tied product.

We need not resolve the ambiguity. The record did not establish the factual predicate for applying the Jefferson Parish statement Polaris relied upon, even read as Polaris would read it. Western offered evidence it was initially enthusiastic about selling Polaris' ATVs and there is no indication Western would have been any less enthusiastic about selling other manufacturers' ATVs. Evidence showed that when the retail ATV market declined, Western objected to Polaris' alleged practice of requiring it to purchase more ATVs than the retail market could bear, but this evidence does not establish Western wished to withdraw from the ATV business altogether. Western offered evidence to the contrary: It did wish to purchase ATVs, but simply not the number of ATVs Polaris demanded.

We conclude Western's claim that it was the victim of a tying arrangement that violated the Sherman Act per se should not have been rejected on motion for summary judgment.

We also conclude summary judgment was improper for Western's claim it was the victim of an unreasonable restraint of trade. Plaintiff may prevail without proof of per se illegality if it can establish the tying arrangement unreasonably restrained trade in the tied product market. See Jefferson Parish, 466 U.S. at 29. The rule of reason analysis requires the fact-finder to "analyze the anti-competitive effects along with any pro-competitive effects to determine whether the [arrangement] is unreasonable on balance." Bhan, 929 F.2d at 1413; see also Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343 (1982). Here, the district court granted Polaris' motion for summary judgment on the ground that the tying arrangement's positive effects on competition outweighed its negative effects.

There were genuine issues of material fact regarding the reasonableness of the tying arrangement. By forcing its snowmobile distributors to distribute its ATVs, Polaris

effectively precluded its distributors from entering the wholesale market for ATVs and the market for ATV distributorships. Though the tying arrangement may also have had pro-competitive effects, we cannot say as a matter of law that these effects outweighed the arrangement's anti-competitive effects.[3]

Similarly, summary judgment must be reversed with respect to Western's claim under Idaho Code § 48-101. The Idaho Supreme Court has recognized that federal decisions interpreting the Sherman Act offer "persuasive guidance" in interpreting and applying Idaho Code § 48-101. Pope v. Intermountain Gas Co., 646 P.2d 988, 994 n.11 (Idaho 1982). The district court granted summary judgment on this claim solely on this ground. Because we reverse the district court's judgment with respect to the Sherman Act claim, we must also reverse the judgment as to the section 48-101 claim.

We also reverse the district court's judgment with respect to the Clayton Act claim. The district court concluded the Clayton Act claim fails because wholesale distributorships are not "goods, wares, merchandise, machinery, supplies or other commodities" within the meaning of section 3 of the Clayton Act, 15 U.S.C. § 14. We disagree. In Chelson v. Oregonian Publishing Co., 715 F.2d 1368 (9th Cir. 1983), a newspaper publishing company allegedly prohibited its retail distributors from distributing advertising inserts for another company. Id. at 1369. We rejected the defendant's claim that the case involved services, not goods, and was therefore outside the scope of section 3, because the agreement between the newspaper company and its distributors provided the distributors would purchase goods (newspapers) from the company and

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[3]Summary judgment of the unreasonable restraint of trade claim was also inappropriate because establishing the relevant market is critical to the rule of reason analysis. Oltz, 861 F.2d at 1446. As we have said, there was a genuine issue of material fact as to the relevant market.

resell them to readers. Id. at 1372. Similarly, Western purchased goods (snowmobiles and ATVs) from Polaris and resold them.

Polaris argues section 3 does not apply because Western never actually purchased any unwanted ATVs. Polaris cites Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376 (9th Cir. 1981), which held section 3 inapplicable when there was no "executed agreement." Id. at 1389. Polaris interprets Ron Tonkin to require an actual payment of money and delivery of goods. However, Ron Tonkin used the term "executed agreement" to distinguish an actual contract from "an offer to enter into an exclusive dealing arrangement." Id. at 1388 (original emphasis). Further, the plain language of section 3 states either a sale or a contract for sale will suffice. 15 U.S.C. § 14 ("It shall be unlawful . . . to lease or make a sale or contract for sale of goods . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods of a competitor . . . of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition . . .") (emphasis added).

Western offered evidence it reluctantly executed a purchase order for 825 Polaris model ATVs in September 1987 in order to keep its snowmobile distributorship. That purchase order is sufficient to invoke section 3. See Smith Machinery Co. v. Hesston Corp., 878 F.2d 1290, 1298-99 (10th Cir. 1989) (citing Ron Tonkin for proposition section 3 requires a contract for sale and stating a purchase order would have constituted such a contract).

The district court held that even if section 3 applied, Western failed to establish the effect of the tie-in "may be to substantially lessen competition," relying on Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977). Moore held "this standard is met either if the seller enjoys sufficient economic power in the tying product market to appreciably restrain competition in the tied

product market or if a not insubstantial volume of commerce in the tied product market is restrained." Id. As we have said, there was a genuine issue of material fact as to the relevant tying product market and no challenge by either party to the district court's finding that the tying arrangement affected a substantial volume of commerce in the ATVs.

Western also alleges Polaris violated Idaho Code § 48-104 (intentionally driving another out of business) and the covenant of good faith and fair dealing implicit in contracts under Idaho law. The district court ruled against Western on these claims only because it ruled against Western on the tying issues. Accordingly, these claims too will be open on remand.

REVERSED and REMANDED.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Western Power Sports, Inc., **No. 90-35359**

Plaintiff-Appellant,

FILED
FEB 25 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

v. **D.C. No. CV-88-1191-MJC**

Polaris Industries Partners L.P.;
Polaris Industries L.P.;
Polaris Industries Associates L.P.;
Polaris Industries Capital
Corporation, **ORDER**

Defendants-Appellees.

Before: BROWNING, CANBY and TROTT, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Western Power Sports, Inc.,
an Idaho corporation,

Plaintiff, **Civil No. 88-1191**

-vs-

Polaris Industries Partners L.P., a limited partnership, Polaris Industries L.P., a limited partnership, Polaris Industries Associates L.P., a limited partnership, and Polaris Industries Capital Corporation, **ORDER**

Defendants.

The Court has before it the motion for summary judgment filed by defendant Polaris. In accordance with the views expressed in the memorandum decision accompanying this order,

NOW, THEREFORE, IT IS HEREBY ORDERED that defendant's motion for summary judgment be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the above-entitled matter be, and the same is hereby, DISMISSED, in its entirety.

IT IS FURTHER ORDERED that each party shall bear their own costs.

DATED this 4th day of April, 1990.

/S/
MARION J. CALLISTER
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

Western Power Sports, Inc., an Idaho corporation,

Plaintiff,

Civil No. 88-1191

v.

Polaris Industries Partners L.P., a limited partnership, Polaris Industries L.P., a limited partnership, Polaris Industries Associates L.P., a limited partnership, and Polaris Industries Capital Corporation,

MEMORANDUM DECISION

Defendants.

The Court has before it the motion for summary judgment filed by defendant Polaris Industries (Polaris). In reviewing this motion for summary judgment the Court must determine whether there exist any genuine issues of material fact. Fed.R.Civ.P. 56(c). The Court heard oral arguments on March 21, 1990, has reviewed the entire matter, and is prepared to submit its written findings.

The above-entitled matter originated when Polaris discontinued using Western Power Sports (WPS) as its distributor for Polaris snowmobiles and all-terrain vehicles (ATVs). WPS began selling Polaris snowmobiles in 1961 and sold them continuously, with the exception of one year, up until 1988. In 1985 Polaris, in order to keep its manufacturing plants in operation all year round, entered into the ATV market. Polaris used its current snowmobile

dealers to distribute the ATVs. In fact, the snowmobile agreement and the ATV agreement were separate and distinct from each other and ran for a period of one year expiring on March 31st of each year unless renewed. Each year Polaris would approach WPS and attempt to find out how many snowmobiles and ATVs the distributor would be able to sell. Snowmobile purchase orders were executed in March of each year and ATV orders were executed in the fall. In September of 1987 WPS, reluctantly, agreed to sign an order with Polaris for 825 1988 model Polaris ATVs. Around this same time the ATV market was becoming depressed due to national safety concerns. Due to the depressed market, WPS attempted to negotiate a reduction in the number of ATVs that it had contracted to purchase for the prior year. Eventually, Polaris refused to reduce the number and in March 1988 WPS told Polaris that it would not accept delivery of the 825 ATVs it had previously ordered. Shortly thereafter Polaris notified WPS on March 21, 1988, that it would not renew the ATV distributorship agreement or the snowmobile distributorship agreement. Polaris maintains that the reason the snowmobile distributorship agreement was not renewed is due to bad sales performance on the part of WPS.

WPS filed this lawsuit on the underlying basis that the snowmobile distributorship agreement was not renewed because of the problems with the acceptance of the ATVs under the ATV distributorship agreement. Plaintiff maintains that such a relationship involves unlawful tying in violation of the Sherman and Clayton Acts. The complaint alleges five causes of action: (1) violation of section 1 of the Sherman Act due to unlawful tying; (2) violation of section 3 of the Clayton Act due to unlawful tying; (3) violation of Idaho Code § 48-101 due to unlawful tying; (4) violation of Idaho Code § 48-104 where Polaris' cancelling of the agreements was for the purpose of driving the plaintiff out of the snowmobile business; and

(5) commission of a malicious and tortious bad faith breach of an express or an implied covenant in the agreements. The Court will address each of these causes of action in turn.

The Court will first address plaintiff's alleged violation of section 1 of the Sherman Act and Idaho's state form thereof under Idaho Code § 48-101.[1] Section 1 of the Sherman Act, 15 U.S.C.S. § 1, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . .
>
> .

In order to establish a per se tying arrangement in violation of section 1 of the Sherman Act, the plaintiff must demonstrate the existence of three elements: (1) a tie-in between two distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product market; and (3) an effect on the non-insubstantial volume of commerce in the tied product market. Mozart Co. v. Mercedes-Benz, 833 F.2d 1342, 1345 (9th Cir. 1987), cert. denied, 109 S.Ct. 179 (1988). As for the first element, the Court is convinced that there are two distinct products involved. The defendant, in its attempt to persuade the Court otherwise, maintains there is only one product, that being the Polaris franchise. The Court cannot accept defendant's position and there were separate and distinct agreements for the snowmobile distributorship as well as the ATV

---

[1]The Idaho Supreme Court has recognized that federal decisions offer persuasive guidance in interpreting and applying § 48-101. Since § 48-101 is patterned after section 1 of the Sherman Act, the Court will analyze such in light of analogous federal decision. See Pope v. Intermountain Gas Co., 103 Idaho 217, 223, 646 P.2d 988, 994 (1982).

distributorship. The second part of the first element is that there must be a tie-in between the two products. The question of fact on this issue has been established by the letter from Polaris to WPS dated March 18, 1988 (Exhibit 14 attached to the Appendix and Memorandum of Law in Support of Motion for Summary Judgment filed January 31, 1990).

The second element the Court must review is whether there was sufficient economic power in the snowmobile agreement market to impose significant restrictions in the ATV agreement market. In reviewing whether or not there are genuine issues of material fact as to this issue, the Court must first determine what the relevant market is. The plaintiff maintains that the relevant market is the market for the wholesaling of snowmobiles and ATVs, which, since Polaris is the only snowmobile manufacturer using distributors, gives them a 100% share of the market. The defendant on the other hand argues persuasively, and the Court adopts the position that the relevant market is the retail snowmobile market. See Mozart Co., 833 F.2d at 1346-47.

In reviewing whether or not there was sufficient economic power here, it was helpful to look at the percentage of the market the parties had. This is exactly what the United States Supreme Court did in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 46 U.S. 2 (1984). In Jefferson Parish the Court held that 30% of the market was insufficient to meet the requirements of the second element for a per se tying arrangement. It appears here that Polaris had approximately 31% of the market in the retail snowmobile industry. Given the United States Supreme Court's findings, this Court holds that as a matter of law such a percentage of the market share does not constitute sufficient market power over the tying product. See

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).[2]

The third factor needed in order to find a per se tying violation is an effect on a non-insubstantial volume of commerce in the ATV product market. In determining this amount, the United States Supreme Court has stated that it should entail all sales covered by tying arrangements. Fortner Enters. Inc. v. U.S. Steel Corp., 394 U.S. 495, 502 (1969). In Fortner, the United States Supreme Court found that $200,000.00 was a substantial sum. In this case, although not precisely known, it appears that the amounts are much greater than $200,000.00. Overall, the Court does believe that plaintiff did meet the third element of the per se test.

In determining whether a per se tying arrangement is present, courts look to see whether or not force has been used. In Jefferson Parish, the United States Supreme Court stated:

> [W]hen a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

Jefferson Parish, 466 U.S. at 16. Here, since WPS could not have bought from another manufacturer, there is no adverse impact on competition. Plaintiff has stretched the use of the term "force." It is uncontradicted that WPS

---

[2]Plaintiff has brought to the Court's attention the testimony of Dr. Edward Whitelaw as to his expert opinion concerning the relevant product market. The Court has reviewed the expert's testimony but finds that as a matter of law the relevant market is the retail snowmobile market.

fiercely sought the ATV distributorship agreement and was awarded such. Likewise, it signed the sales contract ordering the 825 ATVs. Furthermore, cases cited by plaintiff stand for the proposition that the purchasers did not want the product at all and did not distinguish where a purchaser only wanted certain amounts of the product. Here, plaintiff was willing to accept 500 ATVs but did not want to accept the additional 325. Taken as a whole, the Court is unable to find force on the part of Polaris.

In order to prevail in the absence of a per se liability, plaintiff must demonstrate that the violation unreasonably restrained competition. Jefferson Parish, 466 U.S. at 29. It was interesting to note that although the courts recognize this as the "rule of reason," no cases have been found that have awarded the plaintiff a victory after a "rule of reason" analysis. After reviewing the record the Court is unable to find, even assuming a tie-in occurred, that such a tie-in unreasonably restrained the competition. This Court will not condemn the alleged tie-in as it finds its anti-competitive impact is outweighed by its contribution to efficiency, where it was efficient, at least at that time, for Polaris to distribute the ATVs through its snowmobile distributors.

In sum, the Court finds as a matter of law that the plaintiff has not demonstrated sufficient economic power on the part of the snowmobile product market to impose significant restrictions in the ATV product market by Polaris. In addition, it has also failed to demonstrate that the defendant unreasonably restrained competition. Given the Court's finding as to this issue, the Court is required to dismiss counts one and three.

The second count goes to the alleged violation of section 3 of the Clayton Act which also involves tying. To prevail on a Clayton Act section 3 theory, the plaintiff must show that the tie-in products are "goods, wares, merchandise, machinery, supplies, or other commodities." 15 U.S.C.S. § 14. The defendant maintains that the distributorship

agreements relating to Polaris products were not goods, wares, merchandise, machinery or commodities and therefore section 3 is not applicable. The Court agrees with the defendant's position since the basis of the underlying lawsuit centers around two separate distributorship agreements. Cf. Waldo v. North American Van Lines, Inc., 669 F. Supp. 722 (W.D. Pa. 1987).

Originally, there were practical differences between a section 3 and a section 1 theory. However, as the Ninth Circuit Court of Appeals pointed out, the United States Supreme Court's analysis has suggested that the standards are virtually identical. Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977), referring to Fortner Enters. Inc. v. U.S. Steel Corp., 394 U.S. 495 (1969). Under a section 3 theory, the plaintiff must establish that the effect of the tie-in "may be to substantially lessen competition." Moore, 550 F.2d at 1214. In addition, courts have held that forcing a dealer to accept a full line of products in order to retain a dealership violates anti-trust laws only if the effect of such forcing was to lessen substantially competition in any line of the commerce. Pitchford v. Pepi, Inc., 531 F.2d 92 (3rd Cir. 1975), cert. denied, 426 U.S. 935 (1976). Here, the plaintiff did not demonstrate that the effect of the alleged tie-in substantially lessened competition and in its own review of the documents, the Court was also unable to find any evidence indicating this restriction of competition.

In sum, the Court finds that section 3 of the Clayton Act does not apply, and even if it did, the plaintiff would fail to meet the specific requirements. This requires the Court to dismiss count two of the complaint.

At the hearing on the motion for summary judgment, the plaintiff conceded that if defendant prevailed on the summary judgment motion as to the tying issues, remaining counts four and five would also fail. Since this Court finds that counts one, two and three fail, it will also dismiss counts four and five.

DATED this 4th day of April, 1990.

/S/

MARION J. CALLISTER
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF IDAHO

Western Power Sports, Inc., an Idaho corporation,

Plaintiff, **Civil No. 88-1191**

-vs-

Polaris Industries Partners L.P., a limited partnership, Polaris Industries L.P., a limited partnership, Polaris Industries Associates L.P., a limited partnership, and Polaris Industries Capital Corporation, **AMENDED ORDER**

Defendants.

In an order filed April 3, 1990, the Court granted defendant's motion for summary judgment and ordered that the above-entitled matter be dismissed in its entirety. After such time the Court has learned that in a supplemental complaint the plaintiffs sought recover under an additional cause of action. Thus the Court will amend its prior order dismissing counts one through five.

Plaintiffs have also requested that since the main portion of the complaint has been dismissed that the Court may direct that the Court certify this order as a final judgment under Fed.R.Civ.P. 54. The Court has reviewed this matter and finds that there is no just reason for delay and will therefore certify this as a final judgment whereupon an appeal may lie.

Finding good cause therefor,

NOW, THEREFORE, IT IS HEREBY ORDERED that the Court's order filed April 3, 1990, be, and the same is hereby, AMENDED, to indicate that the above-entitled matter be, and the same is hereby, not dismissed in its entirety.

IT IS FURTHER ORDERED that counts one through five of the complaint be, and the same are hereby, DISMISSED.

IT IS FURTHER ORDERED that upon motion of the plaintiff the Court certifies this as a final judgment from which an appeal may be taken.

DATED this 10th day of April, 1990.

/S/
MARION J. CALLISTER
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX F

Statutes Involved:

Sherman Act § 1 (15 U.S.C. § 1):

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years or by said punishments, in the discretion of the court.

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

Clayton Act § 3 (15 U.S.C. § 14):

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for

use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

(Oct. 5, 1914, c. 323, § 3, 38 Stat. 731.)

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Western Power Sports, Inc., an Idaho corporation,

Plaintiff, **Civil No. 88-1191**

-vs-

Polaris Industries Partners L.P., a limited partnership, and Polaris Industries L.P., a limited partnership, Polaris Industries Associates L.P., a limited partnership, and Polaris Industries Capital Corporation,

Defendants.

DEPOSITION OF W. EDWARD WHITELAW, PhD
TAKEN ON BEHALF OF THE DEFENDANTS
AT BOISE, IDAHO
JANUARY 15, 1990

APPEARANCES

MESSRS. HOWARD HUMPHREY and RORY R. JONES, Attorneys at Law, of the firm of Clemons, Cosho & Humphrey, 815 West Washington Street, Boise, Idaho, 83702, appearing for and on behalf of the Plaintiff.

MS. ANNAMARIE A. DALEY, Attorney at Law, of the firm of Robins, Kaplan, Miller & Ciresi, 1800 International

Centre, 900 Second Avenue South, Minneapolis, Minnesota 55402, appearing for and on behalf of the Defendants.

ALSO PRESENT: JAMES BRANDT; LOWELL BASSETT

REPORTED BY:

SHERI D. LUDIKER, C.S.R., R.P.R.
Notary Public

[Excerpts beginning at p. 59]

[p. 59]

Q And what in specifics to the extent you recall did you discuss?

A Well, maybe I can facilitate this. I cannot remember -- I could not repeat right now a single interrogatory that we addressed last August. Generally -- so, I don't know if we have them here, but that would be one way of recalling what the substance of the conversations would have been.

Q Exhibit No. 1 advises you that the law firm of Clemons, Cosho expects to interrogate you on the question of from a market standpoint, are snowmobiles a different product from ATV's and if so, why? Have you reached a conclusion on that question?

A Yes.

Q And what is your conclusion?

A They are different.

Q From a market standpoint snowmobiles are a different product from ATV's?

A Yes.

Q And why are they different?

A Snowmobiles and ATV's can be bought and sold without reference to one another by [p. 60] either buyers or sellers. They are in separate and independent markets, which is another way of stating they can be bought and sold without reference to one another.

Q You say from a market standpoint snowmobiles are different from ATVs. What do you mean by the phrase "from a market standpoint"?

A Well, I suspect from other standpoints one could argue that they are either more similar or more dissimilar to the statement from an economic standpoint.

Q Well, the statement is you had testified, I thought, from a market standpoint.

A Market standpoint or economic standpoint.

Q What do you mean, then, from a market standpoint?

A To say that snowmobiles and ATV's are different products, at least for an economist, this economist anyway, must be discussed in

the context of a market or a market perspective must be used. And by "market" I simply mean a system of transactions.

Q And when you say "for this economist," you [p. 61] were pointing to yourself; correct?

A This economist, Ed.

Q Ed Whitelaw?

A Ed Whitelaw.

Q Again, the phrase "from a market standpoint" --

A Well, I -- is there more to that question? I'm having difficulty responding. I don't -- there are perhaps any number of other standpoints: physics, religious, cosmic. In this case we want to pin it down some. This whole discussion makes little sense if it isn't tied in some way to a discussion of market forces, demand and supply, buyers and sellers.

Q Are you talking about a specific market when you say from a market standpoint?

A Well, yes, there is a specific market I have in mind.

Q And which market is that?

A The relevant market from my standpoint is the wholesaling of snowmobiles in the five-state region that Western Power sports sold snowmobiles in and bought wholesale

snowmobiles in during the relevant period [p. 62] of time.

Q So, when you say from a market standpoint snowmobiles are a different product from ATV's, the market that you're referring to in the phrase "from a market standpoint" is the market of wholesaling of snowmobiles in the five-state region in which Western Power Sports sold snowmobiles and bought snowmobiles?

A Right.

Q You used the phrase, then, "during the relevant time."

A Well, the period of '85 to '88. The relevant -- the markets upstream from the retail level are driven by the retail level, that is what the consumers do or feel about the products. So, ATV's and snowmobiles, if they are different at the retail level, if consumers can separate them in their minds and do separate them in their minds, then that has implications for markets upstream, further up in the hierarchy.

Q So, if I understand you correctly, what you're saying is that if ATV's and [p. 63] snowmobiles are different at the retail level in the consumers mind, then the wholesaling of snowmobiles--

A That has that kind of implication. But it is also true from my standpoint in my opinion that snowmobiles and ATV's can be bought

and sold without reference to one another at the wholesale level as well. And if that's true, then they are not substitutes. They are independent products.

Q And that conclusion is based upon the assumption that ATV's and snowmobiles are different at the retail level in the consumers' minds?

A In part on that observation, yes.

MS. DALEY: Let's just break for a second.

(Whereupon, a discussion was held off the record.)

MS. DALEY: Let's go on the record here. Mr. Whitelaw's deposition was noticed pursuant to a notice of taking deposition --

MR. HUMPHREY: That's all in the . . .

* * * *

[p. 67]

A I have not brought all of those notes with me.

Q Mr. Whitelaw, you've been asked by the lawyers from Clemons, Cosho to respond to this question: "Based upon the information or assumptions provided to you, did Polaris have sufficient market power in the relevant snowmobile market by which it could impose burdensome terms upon the purchases thereof,

such as forcing purchasers also to purchase ATV's?"

A Yes.

Q Do you have an answer or response to that question?

A Yes.

Q What is your answer?

A Polaris had sufficient market power to do those things.

Q What information was provided to you?

A Two things. One, what we were provided were assumptions of behavior of the tying, that is the condition imposed by Polaris for distributors to buy ATV's if they wanted to buy and sell snowmobiles.

Q So, you were asked in connection with your [p. 68] assignment to assume that Polaris conditioned the purchase of snowmobiles on ATV's?

A That's correct. And then based on that assumption, does that demonstrate sufficient market power to do it? And the answer is, of course, yes.

Then what we've also done is read depositions of several individuals. We've not completed all that reading. But of several individuals that

seemed to support or verify that assumption, lend support to that assumption.

Q Which depositions have you read that seemed to have lent support to that conclusion?

A We've read -- here are the ones I've read: Hall Wendel, Nelson, Nygaard, Eaton, Masek, Jones, and glanced at a letter or memo alleged to have been written and distributed by Wendel. Those are the things that I've looked at to this point.

Q Have you been asked to draw any conclusion from your review of those depositions and that letter or memo relating to question No. 2 on Exhibit No. 1?

[p. 69]

A Try the question again.

Q Have you been asked for any opinion as a result of your review of the deposition transcripts you just identified and the letter or memo in relationship to the question No. 2?

A Well, yes. Appreciate I'm not -- I haven't been asked to demonstrate that the tie took place, the alleged tie took place.

Q So, you're assuming the tie?

A I'm assuming the tie and working from there. There's another element relating to the market power sufficient to impose these terms, which another approach is to infer such market

power from the share of the market, the relevant market enjoyed by Polaris.

If one examines that market, Western Power had nowhere else to turn for access to the relevant market, to the wholesaling of snowmobiles. By implication, therefore, Polaris enjoys a 100 percent market share in the relevant market.

Q And the relevant market is what?

A The wholesaling of snowmobiles, the buying [p. 70] and selling -- access to the buying and selling of wholesale snowmobiles.

Q So, the reference to relevant snowmobile market in question No. 2 refers to the market of wholesaling of snowmobiles?

A Correct.

Q And no other relevant market?

A Correct.

Q Any other information that you based your answer to question No. 2 on other than what you've already testified?

A The ability of Polaris to take similar actions in other similar markets in the country supplements the market power enjoyed and exercised in the relevant market.

Q The relevant market of wholesaling of snowmobiles that you referred to in connection

with your answer to question No. 2 is confined by what geographic boundaries?

A As I said before, the five-state region corresponding to Western Power's distribution area during the relevant time period.

• • • •

Supreme Court, U.S.
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No. 91-1893

(2)

In The

Supreme Court of the United States

October Term, 1991

POLARIS INDUSTRIES PARTNERS, L.P., a limited partnership, POLARIS INDUSTRIES L.P., a limited partnership, POLARIS INDUSTRIES ASSOCIATES L.P., a limited partnership, and POLARIS INDUSTRIES CAPITAL CORPORATION, a Delaware Corporation,

Petitioners,

vs.

WESTERN POWER SPORTS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The two questions presented by Polaris for review by the Court on writ of certiorari are inappropriate under the criteria outlined in Rule 10 of the Supreme Court Rules. The first issue merely presents an evidentiary question on what is incorrectly stated to be "uncontroverted" evidence. The second question appears to be an incidental attack upon established antitrust law regarding the necessary elements of a *per se* tying claim.

To the extent that any doubts may have previously existed, they have been laid to rest and both issues resolved as to this case by the very recent Supreme Court decision in *Eastman Kodak Co. v. Image Technical Services, Inc., et al.*, Case No. 90-1029, ____ U.S. ____, 60 L.W. 4465 (June 8, 1992).

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No. 91-1893

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October Term, 1991

POLARIS INDUSTRIES PARTNERS L.P., a limited partnership, POLARIS INDUSTRIES L.P., a limited partnership, POLARIS INDUSTRIES ASSOCIATES L.P., a limited partnership, and POLARIS INDUSTRIES CAPITAL CORPORATION, a Delaware corporation,

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vs.

WESTERN POWER SPORTS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. WPS and Polaris:

Ray Brandt began selling Polaris snowmobiles from the back

of his pickup truck in 1961. Polaris had designated him its distributor in the Northwest territory, which consisted of Montana, Washington, Oregon, Idaho, Utah and Wyoming. Mr. Brandt established the first network of Polaris dealers in the Western region. He sold snowmobiles as a sole proprietor dba Western Power Sports, until 1967 when he incorporated under the name Western Power Sports, Inc. Thereafter, WPS continuously sold Polaris snowmobiles through March 31, 1988, with the exception of the year 1973. During 1973, the only year between 1961 and 1988 that WPS did not sell Polaris snowmobiles it sold Rupp snowmobiles.

Mr. Brandt originally distributed Polaris snowmobiles on a handshake, oral agreement basis. It was not until 1973 that WPS and Polaris (the latter under new ownership and management) for the first time entered into a written distributor agreement for Polaris snowmobile products. That happened after Polaris realized during the 1973 sales year that it did not have the ability or the dealer network to sell snowmobiles in the WPS territory.

Through 1973, WPS sold Polaris products almost exclusively. After losing the Polaris distributorship for the year 1973, WPS began to sell aftermarket products for snowmobiles, and during the 1980s distributed additional products not manufactured by Polaris. Nevertheless, through the final fiscal year during which WPS sold Polaris products, Polaris snowmobiles accounted for about 50 percent of WPS's business and virtually all of its profits.

As of March 31, 1988, Polaris was the only snowmobile manufacturer which distributed its products through wholesale distributors such as WPS. With insignificant exceptions, the other manufacturers sold their products directly to dealers. Polaris distributors who lost their ability to sell Polaris snowmobile products had no other source of supply.

Polaris entered the ATV business in 1985. Polaris acknowledges in this lawsuit that it considered several modes of distribution. According to Kurt Degener, Polaris' former Director of Product Development, however, Polaris chose its then current snowmobile distributors to distribute its ATVs because it could force those distributors to purchase ATVs. While one distributor, Wyn Eaton, was told initially that he had no choice but to become an ATV distributor, others such as Joe Masek later came to the realization that they needed to purchase Polaris ATVs in order to continue purchasing Polaris snowmobiles. WPS was excited initially about the prospects for ATVs, and submitted a business plan seeking the right to sell Polaris ATVs in its geographical territory.

The enthusiasm of WPS and other distributors soon faded. During 1986, several factors combined to severely depress ATV sales in the United States. Those factors included saturation of the market, governmental restrictions because of environmental concerns in many areas of the country, and safety concerns regarding ATV use. By 1987, even Polaris was expressing concern about low ATV sales levels.

The quality of the initial ATVs manufactured by Polaris was beneath industry standards. Polaris' Product Development Manager, Mr. Degener, characterized the early ATVs shipped to distributors for resale as "prototypes" or "pre-production" models not yet ready to be sold at retail. The physical defects included an outdated two-stroke engine, substandard ATV frames, poor quality hardware, inadequate function of the rear brake, improperly applied paint and bottom-of-the-line plastic parts. Nevertheless, in the face of what Polaris perceived was a rapidly growing industry, Mr. Degener stated that Polaris made a management decision to rush these ATVs on the market in order to garner a quick market share by coercing its distributors to purchase those ATVs. Furthermore, those machines were priced

comparably to other manufacturers' much better products. Mr. Masek characterized Polaris ATVs as "turkeys" and "dogs".

Like the snowmobile distributor agreements, the ATV distributor agreements were adhesion contracts purporting to be for one year periods. Initially, the ATV agreements delineated a different fiscal year than the snowmobile agreement. It was not until 1987 that the fiscal year for the ATV agreements was changed to April 1 through March 31 to coincide with the snowmobile distributor agreements. *At all times, Polaris purported to treat the snowmobile and ATV agreements as entirely separate agreements,* and it is obvious that only in regions having winter snow could distributors or dealers sell both ATVs and snowmobiles.

After the public's enthusiasm for ATVs died and sales dropped, Polaris carried out its tie by forcing distributors to purchase unwanted ATVs under the subterfuge of evaluating snowmobile "distributor performance" by evaluations relating to both ATVs and snowmobiles. Distributors were alarmed at having their snowmobile performance evaluated in light of their sales of ATVs, because they were losing money on the sale of ATVs and related products. Distributors were informed of this evaluation process in January, 1986, by a Polaris letter to its distributors explaining that it declined to renew the snowmobile distributor agreement of a fellow distributor, Larsen-Olsen, because of its refusal to take a required allocation of ATVs. This early termination demonstrated to distributors that the purchase of snowmobiles and ATVs were tied together.

After the initial letter from Polaris regarding Larsen-Olsen, distributors including WPS understood that continuation of their ability to buy snowmobiles was contingent upon their continued purchase of allocated ATVs. The president of Polaris, Hall Wendel, indicated at the 1986 snowmobile distributor meeting

in Minneapolis, Minnesota, that sales of snowmobiles and ATVs were tied together, and he would "terminate his own mother if she reneged on an ATV order." Distributors, including WPS, therefore agreed to purchase from Polaris ATVs and related products that they did not want, with full knowledge that they would lose money on the sale of those ATVs.

Although Polaris' threat to terminate distributors who balked at ATV allocation succeeded in placing many ATVs on the retail market, it also resulted in the nonrenewal of several distributors. Polaris refused to sell snowmobiles to Larsen-Olsen because it balked at its ATV allocation. Similarly, Polaris refused to sell Eaton Manufacturing snowmobiles for "not selling enough ATVs." As late as March 28, 1988, Polaris indicated to WPS that Polaris would renew the snowmobile distributor agreement only if WPS took the allocated number of ATVs. When WPS refused to purchase the number of ATVs it had been allocated by Polaris, because of certain financial destruction, Polaris notified WPS of its decision not to renew the ATV or snowmobile agreements.

While most of Polaris' distributors sold products other than Polaris products, the ordering process was different with Polaris than with any other manufacturer. Polaris dictated to each individual distributor its allocation for any given year, and required that the written order prepared by Polaris be signed and returned without alternation. Distributors were only superficially included in the process which led to their own dictated allocation. Distributors did not believe the allocation process reasonably related to actual market conditions, but declined to fight the process in order to retain their snowmobile distributor rights.

Distributors, including WPS, were losing money on the sale of ATVs for the model years prior to the nonrenewal of WPS on March 31, 1988. The distributors lost money because they were

taking more ATVs from Polaris than could be profitably sold at retail, and taking more ATVs than the market could bear.

Polaris distributors never lost ultimate financial responsibility for ATVs even after they had been delivered to dealers. While Polaris could force distributors to take unwanted ATVs, the distributors had no such market power over their dealers. In order to market the ATVs at retail, the distributors participated in promotional programs and severe price reductions which not only wiped out any potential profit, but resulted in substantial losses. From a practical standpoint, to protect their dealers, distributors often had to repurchase ATVs which the dealer could not sell at retail.

On the other hand, as noted above, once distributors had paid cash for their ATVs, pursuant to allocations which had been determined by Polaris, Polaris no longer had financial responsibility for the ATVs. As a result, with a brand new product on which its distributors were losing substantial amounts of money, Polaris was able to make increasingly greater annual profit and profits on sales of its ATV.

In summary, Polaris refused to sell snowmobiles to distributors who did not accept dictated ATV allocations. Because of this, and after the downturn in the ATV market in 1986, Polaris distributors continued to agree to purchase ATVs in order to be able to purchase snowmobiles, even though they were losing money on the sale of those ATVs. This tying arrangement continued as to other distributors even after Polaris notified plaintiff it could no longer purchase snowmobiles after March 1, 1988 because of its refusal to purchase the allocated ATVs.[1]

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1. As with WPS, the forcing of ATVs typically lasted until a distributor could no longer tolerate ATV losses, at which time Polaris would terminate (Cont'd)

Finally, in light of Polaris' arguments regarding "reasonable substitutes" and "cross-elasticity," a brief discussion of the distributors' dealer networks is necessary.

WPS and the other Polaris distributors created and developed the snowmobile retail dealer networks in their respective territories at great cost and effort on their part, and with minimal assistance from Polaris. Typically, as in the case of WPS, the effort consisted of many years of seeking and developing relationships with financially sound dealers in a position to successfully conduct retail sales of Polaris snowmobiles at strategic locations within its distribution territory. The effort included education of dealers regarding the attributes and use of Polaris snowmobiles, the development of mutual confidence and the development of satisfactory and successful warehousing, financing, delivery and sales arrangements. It included the development of facilities and techniques for quick delivery of replacement parts and accessories, and it included the creation and active participation on the part of WPS in nonprofit associations of snowmobile users within the sales territories of its dealers.

(Cont'd)
the distributor, take over its dealer network and hire its top level snowmobile-ATV sales personnel. For example, in 1987 Polaris allocated to WPS 825 1988-model ATVs and Jim Brandt for WPS signed an order therefor after being told that he had no choice but to do so. When sales in 1987 showed that the number was clearly unreasonable, and when WPS complained, Polaris arbitrarily raised the allocation to 828 ATVs and terminated WPS when it refused to purchase the same.

The total number of 1988-model ATVs actually sold in WPS' territory was 486. This included 295 units sold by WPS prior to its termination on March 31, 1988 and 191 units sold by Polaris directly to dealers between March 31, 1988 and September 30, 1988, the end of the ATV sales year. The extra cost to WPS for the difference between 486 ATVs and the 828 ATVs allocated by Polaris was $720,088.53.

These factors are all relevant to Polaris' contentions regarding reasonable substitutes and cross-elasticity for several reasons, including the following:

> 1. WPS could not reasonably switch from the sale of snowmobiles and snowmobile parts, accessories and clothing to the sale of TV sets to, e.g., a snowmobile dealer located by a mountain in northern Washington. The market demands are obviously different and the efficiencies of its snowmobile distribution, promotion and sales techniques are clearly inapplicable to the retail sales of TV sets.
>
> 2. Regarding the cross-elasticity of supply, the snowmobile manufacturers other than Polaris had for many years prior to 1988 invested the time and money to develop their retail dealer networks and the relationships and techniques attendant thereto. Those manufacturers were not in a position to use wholesale distributors. Once Polaris stopped selling snowmobiles to a distributor for resale that distributor had no place to turn in order to obtain a new supply of snowmobiles. The distributor also had nothing to offer another manufacturer of snowmobiles in terms of its established dealer network because its dealers were still selling Polaris snowmobiles purchased directly from Polaris.

A finder of fact can conclude that "reasonable substitutes" and "cross-elasticity" were absent as to Polaris snowmobile distributors. The controlling law is discussed below.

B. The Polaris View of the Facts.

The petition for a writ of certiorari filed by Polaris in this matter includes a statement of the case set forth in pages 3 through

6 thereof. Statements of fact contained therein which are deemed misleading by WPS deal with its past wholesale business and the historical relationship between Polaris and WPS.

It is true that in the latter part of the 27-year history of WPS prior to 1988 the company, in an attempt to expand beyond a one-product distributorship in its wholesale business, did at one time or another sell, or attempt to sell, the products listed by Polaris. More relevant, however, is the fact that WPS was founded in 1961 as one of the earliest Polaris snowmobile distributors, and that throughout its entire history snowmobiles were the life blood of the company up to the time of its termination by Polaris in 1988.

At the time of termination WPS distributed products for only about five manufacturers in its original equipment business. As stated above, Polaris snowmobiles at that time accounted for about 50 percent of WPS's entire business, and for virtually all of WPS's profits. This was the result not only of the high quality of the Polaris snowmobiles created and developed by the original founders of Polaris, but also was result of the retail dealer network built almost single-handedly by WPS in the five-state territory in which it distributed Polaris snowmobiles and to which network Polaris succeeded after it terminated WPS.[2]

REASONS FOR DENYING THE WRIT

Any question regarding the viability of WPS's illegal tying claim against Polaris has been answered by this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, Case No. 90-1029, 60 L.W. 4465 (June 8, 1992). Therein, the Court

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2. Those dealers were not for the most part the same dealers WPS used in its sales of products other than snowmobiles and ATVs.

reaffirmed its *per se* rule against tying arrangements and held once again that where material issues of disputed fact are presented on the elements of a *per se* tying claim summary judgment is inappropriate.

The Court first distinguished the primary case relied upon by Polaris, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The standards governing review of summary judgment motions remain unchanged:

> [T]he evidence of [respondents] is to be believed, and all justifiable inferences are to be drawn in [their] favor.

Id. at 4466, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Court further reiterated that "Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Id.* at 4470. The Court concluded in *Eastman Kodak* that in order to obtain summary judgment Eastman Kodak had the burden to "show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable." *Id.* Eastman Kodak failed in that burden.

WPS in this case produced evidence of excluded competition, adverse impacts on the competitive process, and market distortion. In order to obtain summary judgment, consistent with *Eastman Kodak*, Polaris was required to show that despite evidence of excluded competition and market distortion, an inference of market power was unreasonable. Polaris failed to carry that burden.

This Court in *Eastman Kodak* also reaffirmed the definition of "market power" adopted in *Jefferson Parish Hospital District*

No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984).

> Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'

Id. at 4468, quoting *Jefferson Parish*, 466 U.S. at 14. The evidence in this case is that WPS and all of Polaris' other distributors did things they would not do in a competitive market by purchasing ATVs they did not want and upon the sale of which they knew they would lose money, so that they could continue to purchase snowmobiles. The reasoning of the Court in *Eastman Kodak* reinforces WPS's theory on the market power issue.

This Court in *Eastman Kodak* examined the purpose of the antitrust laws as follows:

> The alleged conduct — higher service prices and market foreclosure — is facially anticompetitive and exactly the harm that antitrust laws aim to prevent.

Id. at 4472. WPS's evidence in this case establishes excluded competition, market distortion, and an anticompetitive effect in the market for ATVs — exactly the harm the antitrust laws aim to prevent.

Finally, this Court's decision in *Eastman Kodak* also answers the second "question presented" by Polaris' cert petition. Polaris tried to rewrite the *per se* illegal tying test established in *Jefferson Parish* by referring to the final element as "an actual adverse effect on competition or had a substantial potential for impact on competition." Polaris Petition, p. i. In *Eastman Kodak*, this Court phrased the final element as whether "the arrangement affects a substantial volume of commerce in a tied market." *Id.*

at 4468, citing *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969). *Eastman Kodak* thus reinforced that a simple arithmetical inquiry into the volume of commerce effected in the tied product market is all that is required in analyzing an unlawful tying claim. WPS satisfied that test.

This Court should deny review and let this matter proceed to trial. Its decision in *Eastman Kodak* has directly or indirectly addressed each and every argument raised by Polaris in its cert petition. The Ninth Circuit's decision reversing the grant of summary judgment is consistent with this Court's previous decisions in tying cases and consistent with this Court's most recent decision in *Eastman Kodak*.

I.

WPS'S EVIDENCE DEMONSTRATED POLARIS HAD AND EXERCISED MARKET POWER IN THE TYING PRODUCT OF SNOWMOBILES TO FORCE DISTRIBUTORS TO PURCHASE THE TIED PRODUCT ATVS.

Polaris challenges the Ninth Circuit's ruling that material issues of disputed fact preclude summary judgment as to whether Polaris had market power over its distributors in the tying product market of snowmobiles.[3] Summary judgment is improperly granted

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3. The long-standing Ninth Circuit rule is that the definition of a relevant market is a factual inquiry reserved for the trier of fact. *William Inglis & Sons Baking Co. v. I.T.T. Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir. 1981), *cert. denied*, 469 U.S. 825, 103 S. Ct. 58, 74 L. Ed. 2d 61 (1982); *Los Angeles Memorial Coliseum Com'n v. N.F.L.*, 726 F.2d 1381 (9th Cir. 1984); *cert. denied*, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984); *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 995 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031, 107 S. Ct. 876, 884, 93 L. Ed. 2d 830 (1987); *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1446 (1988); *Image Technical*

(Cont'd)

where, as here, a plaintiff presents evidence which creates a disputed issue of fact as to whether the defendant had market power in the tying product market. In this case, three types of evidence establish material issues of disputed fact as to whether Polaris had market power in a relevant market over its distributors, including WPS.

First, the best evidence that Polaris had the market power to impose a tying arrangement is that Polaris in fact effectively imposed the tying arrangement. Distributors, including WPS, signed orders for the purchase of ATVs and subsequently purchased ATVs (both of which constitute violations of the Sherman Act/Clayton Act), which they did not want and did not believe they could sell, in order to purchase snowmobiles. In the historic case of *United States v. Addyston Pipe & Steel Co.*, then Judge Taft was faced with the claim that the defendants lacked market power. He responded:

> The most cogent evidence that they had this power is the fact everywhere apparent in this record that they exercised it.

85 F.271, 292 (6th Cir. 1897), *Affirmed,* 175 U.S. 211 (1898). The same is true in this case.

The reasoning of Judge Taft, that the best evidence of market power is the fact that it has been exercised, was reaffirmed by this Court in *Eastman Kodak* when the Court reasoned as follows:

> It is clearly reasonable to infer that Kodak has market power to raise prices and drive out

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Service, Inc. v. Eastman Kodak Co., 903 F.2d 612 (9th Cir. 1990); *Eastman Kodak Co. v. Image Technical Services, Inc.*, Case No. 90-1029, 60 L.W. 4465 (1992).

> competition in the after-markets, since respondents offer direct evidence that Kodak did so.

Id. at 4472. Substantial evidence in the record supports a jury finding that Polaris did in fact impose a burdensome tying arrangement on WPS and its other distributors. That evidence includes the following:

> 1. Polaris refused to renew the snowmobile distributor agreement of WPS's fellow distributor, Larsen-Olsen, because of its refusal to take a required allocation of ATVs.
>
> 2. A memorandum explaining the termination of Larsen-Olsen was distributed to the remaining Polaris distributors which specifically stated that the purchase of snowmobiles and ATVs would be henceforth tied together.
>
> 3. Thereafter, distributors, including WPS, understood that continuation of their ability to buy snowmobiles was contingent upon their continued purchase of Polaris ATVs.
>
> 4. The president of Polaris, Hall Wendel, indicated at the 1986 snowmobile distributor meeting in Minneapolis, Minnesota, that sales of snowmobiles and ATVs were tied together and that he would "terminate his own mother if she reneged on an ATV order."
>
> 5. According to Kurt Degener, Polaris' own director of product development:
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> While I was at Polaris, and while deficiencies in ATV and construction were well known and understood by Polaris management, as well as the

> existence of a declining market in ATVs, an administrative decision was made and implemented to *coerce* Polaris distributors around the country to purchase unwanted ATVs. The decision was that distributors would be required to buy predetermined amounts of ATVs in order to get the more saleable product snowmobiles. Distributors were *forced* to contribute money to sales programs in order to get rid of the below standard ATVs on the retail market, on the Polaris philosophy that the distributors would have to share in losses, with the hope of making them up in the future if the new and improved ATVs would come out from Polaris. Particularly during the 1986/87 season, such sales programs devised by Polaris were *forced* upon reluctant distributors. It was well known by Polaris top management that the distributors, as well as dealers, were suffering significant losses in their distributors and sale of ATVs. (emphasis added)

Thereafter, and before Polaris determined not to renew WPS's snowmobile distributor agreement, the following further events occurred:

> 1. Eaton Manufacturing lost its snowmobile distributor agreement for "not selling enough ATVs."
>
> 2. Other Polaris distributors from around the country were also being terminated for their failure to cooperate on ATV sales.

In addition, Polari's distributors purchased ATVs they did not want and upon the sale of which they knew they would lose money, for years prior to and including the 1988 ATV model

year. They did so, so they could continue to purchase Polaris snowmobiles.

Forcing is the essence of what the Supreme Court contemplated when it referred to a seller using leverage to force a purchaser to do something it would not do in a competitive market. *Jefferson Parish*, 466 U.S. at 14 and n. 20; *Eastman Kodak*, 60 L.W. at 4468. Because Polaris was the only snowmobile manufacturer from which WPS, Masek, Eaton and other distributors could purchase snowmobiles, Polaris had substantial leverage or market power over its distributors. It used that market power to force WPS and its other distributors to purchase ATVs. Polaris' forcing enabled it to make a profit on an inferior prototype product for which it had not incurred normal development costs, to obtain 5 percent of the market in four years, and to make a profit during each one of those years, while its distributors and dealers were losing money that entire period of time.

WPS and other distributors were doing something they would not do in a competitive market, purchasing ATVs they could not sell. Polaris "coerced the abdication of buyers' [its distributors] independent judgment as to the tied product's merit [ATVs] and insulated [the tied product] from the competitive stresses of the open market." *Jefferson Parish*, 466 U.S. at 13, quoting *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 606, 73 S. Ct. 872, 97 L. Ed. 1277 (1973) (bracketed material added).

The reasoning for this rule was also articulated in *Jefferson Parish:*

> The seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the ***buyer either did not want at all or might have preferred to purchase elsewhere or on different terms where such "forcing" is***

> *present competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.*

Id., 466 U.S. at 13 (emphasis added). In this case the evidence is unrebutted that WPS and other distributors purchased ATVs that they did not want or would have preferred to purchase elsewhere.

The Sherman Act and Clayton Act require a competitive market in which goods survive or fail on their merits. Polaris knew its bad ATVs would not survive in a declining ATV market. Polaris tried to insulate its ATVs from competition by exploiting its market power over its ATV distributors. The exploitation of this power demonstrates its existence and violates the command of the antitrust laws that competitive forces should be allowed to operate. "Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition . . ." *Jefferson Parish*, 466 U.S. at 12, quoting *Times-Picayune*, 345 U.S. at 605. This was more than sufficient evidence of market power to preclude summary judgment on this issue.

The second category of evidence that Polaris had market power over its distributors is that Polaris had a large share of a properly defined relevant market. The market in this case is the wholesale market for snowmobiles in a five-state area. Polaris had market power because it was the only manufacturer of snowmobiles which sold to distributors such as WPS. Neither WPS nor any other distributor had the ability to obtain snowmobiles from another source. In assessing whether a seller has market power over a group of purchasers, the relevant market is defined by the alternative sources of supply to which those purchasers could turn. *Jefferson Parish, supra.* On that basis, Polaris had 100 percent of the relevant product market, the wholesale market for snowmobiles.

In its petition Polaris makes two basic errors in its claim that there are no material issues of fact in controversy regarding the power in the tying product element of the *per se* rule against tying. Initially, Polaris ignores evidence of its market power in both the wholesale and retail snowmobile markets, either of which is sufficient to defeat summary judgment. Additionally, when addressing the second category of evidence presented by WPS, Polaris ignores the entire record except for one two-question interchange in one deposition.

WPS presented expert and nonexpert evidence supporting the conclusion that the appropriate market for assessing Polaris' market power is the wholesale market for snowmobiles. Polaris has pointed to two short deposition answers as a basis for controverting this argument. Obviously, this creates a controverted issue of fact the existence of which should dispose of Polaris' petition. It is, however, worth exploring the questionable nature of Polaris' side of this factual dispute.

Polaris contends that the market is larger than snowmobiles available for purchase at wholesale. In making this contention Polaris refers to the concepts of the cross elasticities of demand and supply. These are of course appropriate concepts for determining a relevant market. Polaris, however, abuses both concepts by making assumptions about how easy it would be for WPS to enter new businesses and how willing other snowmobile manufacturers would be to abandon their relationships with retailers. Polaris contends that cross elasticity of demand is high because WPS could effortlessly switch from distributing snowmobiles to distributing other products. Polaris also argues that cross elasticity of supply is high because other manufacturers of snowmobiles would costlessly forsake their relationships with retailers and begin selling to wholesalers. Both of these assertions are false since they ignore the large costs of establishing or abandoning a complex set of multifaceted relationships with retail dealers.

The relationship between firms at different levels of a distribution chain is the result of years of effort to build up the trust necessary for effective cooperating in the marketing of a product. This trust is necessary since the firms must share information about the product and its consumers, must share financial risk and must allocate the numerous tasks in the most efficient manner. This Court has been very careful to prevent the disruption of this relationship by outside forces. *Business Electronics Corp. v. Sharp Electronics,* 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464 (1985), 79 L. Ed. 2d 775; *Contintental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).

In those areas of the country where Polaris distributed snowmobile products through its distributors, the snowmobile products were sold in the wholesale market. In that market, Polaris had no competition. Polaris did not sell directly to the public and did not sell directly to retailers. Instead, it used a distributor system whereby it sold its snowmobile products to independent distributors. Distributors who could not sell Polaris products would look to other manufacturers of snowmobiles as alternative sources for supply of those snowmobiles. There were none. The relationship at issue in this case, is the relationship between Polaris and its distributors, including WPS.

A third category of evidence WPS presented addressed the retail market for snowmobiles. Even if Polaris is correct that the relevant tying market was the retail sale of snowmobiles, Polaris' market share of 31 to 40 percent is sufficient market power in the snowmobile market.[4] Contrary to the assertion by Polaris that

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4. WPS agrees that Polaris' retail market share of the United States snowmobile market was *at least* 31 percent. Polaris' own expert witness testified that its market share might be as high as 40 percent.

the snowmobile market has ease of entry, there are now only four major manufacturers of snowmobiles, and only one manufacturer has entered or reentered the business during the 1980s. Furthermore, Polaris misunderstands this Court's decision in *Jefferson Parish* when it asserts that 30 percent of the market was insufficient to meet the market power requirement.

In *Jefferson Parish*, this Court did refer to the numbers 70 percent and 30 percent. However, these numbers were not used as shares of a relevant geographic market. Instead, the Court used those numbers to uphold the district court which found the relevant geographic market to be the entire New Orleans metropolitan area in which the defendant was only one of at least twenty hospitals. 466 U.S. 7, 26-27. 70 percent of the patients in the geographic area immediately surrounding the defendant hospital went not to the defendant hospital, but to hospitals elsewhere in the New Orleans metropolitan area. This demonstrated that hospitals elsewhere in the metropolitan area were good substitutes for the defendant hospital and should be included in the relevant market. Since there were at least 20 such hospitals, defendant's market share was insignificant. Polaris misreads *Jefferson Parish* as saying a producer with 30 percent of a relevant market does not have market power. This is clearly a mistake. The defendant hospital in *Jefferson Parish* was one of twenty metropolitan area hospitals and therefore had an insignificant share of the market.

This Court in *Jefferson Parish* never defined a relevant market. Rather, the Court simply said that of those patients who resided in East Jefferson Parish, 70 percent chose to use hospitals other than Jefferson Parish. The Court noted, "70 percent of the patients residing in Jefferson Parish enter hospitals other than East Jefferson," 466 U.S. at 26, expressly indicating that those 70 percent who do not go to East Jefferson Parish are also in the relevant market. The Court never further defined that relevant market except by noting that there were at least 20 hospitals

therein. 466 U.S. at 27, n.44. In this case, Polaris is one of four snowmobile manufacturers, with at least 31 percent of the market.

The second important aspect of *Jefferson Parish* is that the Court found no evidence that any hospital patients had been forced to purchase hospital-provided anesthesiology services. The Court stated:

> Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made.

466 U.S. at 27. In contrast, in this record WPS provided substantial evidence that it and other distributors were forced to purchase ATVs that they would not have purchased absent the tying arrangement. On that basis, *Jefferson Parish* supports WPS's position that Polaris has market power over WPS.

Relying upon cases wherein courts have rejected a single brand market, Polaris attacks the market definition supported by WPS. Polaris misguidedly relies upon *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 957 F.2d 1318 (6th Cir. 1992) and other similar cases which have rejected market definitions limited to a single manufacturer. The court in *Virtual Maintenance* and the cases relied on therein simply rejected a plaintiff's suggested market definition consisting of a single manufacturer's brand. Unlike the plaintiff in *Virtual Maintenance* and the other cases relied on therein, WPS is not suggesting a market consisting of a single manufacturer's brand.

Here, consistent with *Jefferson Parish*, WPS is asserting a market definition based upon alternative sources of supply. That market consists of any manufacturer who sells snowmobiles to distributors. Polaris, of course, is the only product manufacturer selling products in that market. As Polaris was the only supplier

of snowmobiles to wholesalers, and wholesalers had no alternative sources to purchase snowmobiles, Polaris had 100 percent of the relevant market.

WPS presented substantial evidence that Polaris had market power in a relevant market sufficient to impose an unlawful and burdensome tying arrangement on its distributors. The Ninth Circuit's decision so holding is consistent with *Jefferson Parish* and *Eastman Kodak*.

II.

POLARIS' ILLEGAL *PER SE* TYING ARRANGEMENT AFFECTED A NOT INSUBSTANTIAL VOLUME OF COMMERCE IN THE TIED PRODUCT MARKET.

Polaris' position on its second issue is nothing more than a poorly disguised attack on this Court's illegal *per se* approach to tying arrangements when certain factors are present. Polaris is urging this Court to rewrite the third element of the *per se* illegal tying arrangement test reaffirmed in *Jefferson Parish* and *Eastman Kodak* so that its conduct is not *per se* illegal. WPS respectfully submits that an interlocutory review of a decision denying a motion for summary judgment is not an appropriate forum for a change in established law, at least not under the facts of this case.

Polaris contends that the third element of a prima facie *per se* tying violation is unsatisfied in this case. Polaris has never credibly asserted that the third element is anything other than a calculation of the volume of commerce in the tied product. Where, as here, the dollar volume is in the millions of dollars, there is no question that the "substantial volume of commerce" requirement is satisfied. Both the district court and Ninth Circuit had no trouble finding this element satisfied.

The third element of a *per se* illegal tying claim is well established as follows: "an effect on a noninsubstantial volume of commerce in the tied product." *Jefferson Parish,* 466 U.S. 2, 2-18; *Eastman Kodak,* 60 L.W. at 4468. Polaris tries to rewrite that third element as "an adverse effect on a not insubstantial volume of commerce in the tied product market." Petition for Certiorari, pp. 10, 21-24. While this Court's phrasing of the third element simply looks to the dollar volume of commerce affected by the illegal tie, Polaris' rewritten version confuses the *per se* rule with the rule of reason by focusing on whether or not there is an adverse effect in the tied product market.

As noted above, any doubt as to the proper phrasing of this element was answered by this Court in *Eastman Kodak*, wherein it stated:

> Such an arrangement violates Section 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement *affects a substantial volume of commerce in the tied market.*

Id. at 4468. The third element is satisfied if the dollar volume of commerce in the tied product is substantial, without regard to whether the illegal tie is otherwise shown to have an adverse effect in the tied product market.

The trial court properly found, and the Ninth Circuit concurred, that based upon *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969) ("*Fortner I*"), the amount of commerce affected in the tied product of ATVs was substantial. Fortner only requires that the amount of commerce be "substantial enough in terms of dollar volume so as not to be merely '*de minimis.*' "

In 1988 alone, the dollar volume affected is based on WPS's refusal to purchase 828 ATVs instead of the 500 to which WPS contends it ultimately agreed as a compromise of the Polaris allocation. The cost of those additional ATVs to WPS would have been over $700,000. In addition, for purposes of determining the substantiality of the sales affected in the tied product market, the Court should measure the total volume of sales tied by the alleged tying arrangement, not merely the portion of this total accounted for by the particular plaintiff who brings suit.[5] *Fortner I*, 394 U.S. at 502. Therefore, the Court can also consider the purchases of unwanted ATVs by Masek, Nelson & Small and Eaton in determining the total dollar volume of commerce affected in the tied product. The Court can also consider that those dollar volumes for each distributor were repeated on an annual basis. The *Fortner I* requirement that the tying arrangement affect a noninsubstantial volume of commerce and the tied product is met.

Finally, this Court should reject Polaris' legally incorrect assertion that the *per se* rule is inapplicable because their agreements are alleged to have had pro-competitive justifications. In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982), this Court rejected an identical argument as follows:

> The respondent's principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have pro-competitive justifications.

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5. Polaris has at all times sought to treat this case as one limited to a single distributor and a single product manufacturer, contrary to the record which is that Polaris imposed this illegal tying arrangement on all of its distributors for volumes of products in the millions of dollars. If Polaris terminated WPS as part of its attempt to impose an unlawful tying arrangement on all of its distributors, WPS may sue under the Sherman Act pursuant to this Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464 (1985), 79 L. Ed. 2d 775.

> The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if pro-competitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application.

457 U.S. at 351, 73 L. Ed. 2d at 63. Like price fixing arrangements, tying arrangements with certain characteristics are *per se* illegal. No analysis of pro-competitive justifications is necessary where, as here, a *per se* illegal tying arrangement is established.

III.

WPS PRESENTED SUFFICIENT EVIDENCE OF ANTICOMPETITIVE EFFECT TO SURVIVE SUMMARY JUDGMENT ON ITS RULE OF REASON CLAIM.

In addition to establishing *per se* violations of the Sherman and Clayton Acts, WPS presented credible evidence that Polaris' tying arrangement would not survive rule of reason scrutiny.

Polaris has argued that foreclosure of other sellers of the tied product is the only anticompetitive effect giving rise to the prohibition against tying arrangements. The Court made clear in *Jefferson Parish* that anticompetitive effects in addition to foreclosure give rise to the *per se* rule against forced tying arrangements. The Court identified market distortion as an anticompetitive effect of tying arrangements as follows:

> [T]he seller's exploitation of its control over the tying product to force the buyer into the purchase

> of a tied product that the buyer did not want at all, or might have preferred to purchase elsewhere or on different terms. Where such "forcing" is present competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

466 U.S. at 13.

Polaris' former product development manager, Kurt Degener, testified that the same anticompetitive effect resulted from the tying arrangement imposed by Polaris:

> Deficiencies in ATV design and construction were well known and understood by Polaris management, as well as the existence of a declining market in ATVs. An administrative decision was made and implemented to *coerce* Polaris distributors around the country to purchase unwanted ATVs. The decision was that the distributors would be required to buy predetermined amounts of ATVs in order to get the more salable product, snowmobiles. Distributors were forced to contribute money to sales programs in order to get rid of the below-standard ATVs on the retail marked, under Polaris' philosophy that the distributors would have to share in losses with the hope of making them up; in the future if the new and improved ATVs would come out from Polaris. Particularly during the 86/87 season, such sales programs devised by Polaris were force upon reluctant distributors. It was well known by Polaris top management that the distributors, as well as dealers, were suffering significant losses in their

distribution and sale of ATVs. (emphasis added).

Mr. Degener's affidavit alone was sufficient to create material issues of disputed fact regarding the anticompetitive effect of this tying arrangement.

Mr. Degener's unrebutted testimony establishes that Polaris' illegal tying arrangement was an anathema of efficient and beneficial competition. Polaris made a corporate policy of forcing prototype substandard products on the wholesale, and thereby the retail, markets at prices comparable to those of its competitors by forcing those ATVs down the throats of its distributors, all of whom lost substantial sums on the sale of those ATVs while Polaris made a profit. After Polaris captured a 5 percent share of the ATV market by forcing its tie-in on its distributors, Polaris terminated those distributors. Without the tie-in, their substandard ATVs would not have survived the test of competitive marketing.

These substantial adverse impacts on the competitive process were anticipated by the *Jefferson Parish* Court which identified the evil of a tying arrangement as when "the seller coerces the abdication of buyer's independent judgment as to the tied product's merit and insulates (the tied product) from the competitive stresses of the open market." *Jefferson Parish*, 466 U.S. at 13, quoting [*Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 606]. Polaris ATVs did not "stand the cold test of competition" as further contemplated by *Jefferson Parish*, 466 U.S. at 12, quoting *Times-Picayune*, 345 U.S. at 605.

The affidavit of Mr. Degener also established an adverse impact on the retail market for ATVs, the tied product. The ATV market was affected in that to the extent Polaris sold ATVs, Polaris' competitors were foreclosed from that portion of the ATV market. Polaris' retail volume of ATV sales was in the millions of dollars. In addition, retail purchasers were affected as consumers

purchased substandard ATVs which they did not know were prototypes, based upon Polaris' reputation for making high quality snowmobiles. The substandard ATVs would not have made it to the retail market absent the forced tie-in in the wholesale market. In short, Polaris' illegal tying arrangement had anticompetitive intent and anticompetitive consequences in the ATV market.

Polaris has asked the Court to weigh the procompetitive benefits of its decision to go dealer direct in analyzing its unlawful tying arrangement. Weighing procompetitive benefits with anticompetitive effects is an appropriate inquiry in rule of reason analysis. However, WPS has never challenged the decision to go dealer direct and has not asserted that is was unlawful. Rather, WPS has challenged Polaris' illegal tie and it is the alleged procompetitive effects of that illegal tie which must be weighed with any procompetitive benefits flowing from that tie. *Jefferson Parish*, 466 U.S. at 30. WPS presented substantial evidence of anticompetitive effects, which evidence was sufficient to create disputed issues of material fact precluding summary judgment on its rule of reason claim.

CONCLUSION

Based upon all of the foregoing authorities, and particularly under the controlling cases of *Jefferson Parish* and *Eastman Kodak*, the Polaris petition for writ of certiorari should be denied.

Respectfully submitted,

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